5

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 425.

GRAND TRUNK WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE LINDSAY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED JANUARY 13, 1913.

(23,500)

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INDEX.

	Original.	Print
Caption	a	1
Transcript from the circuit court of the United States for the northern district of Illinois	1	1
Placita	1	1
Cook county superior court record	2	1
Placita	2	2
Praecipe for summons	3	3
Declaration	4	3
Petition for removal	7	6
Bond	8	7
Notice of motion to remand	10	9
Order of March 2, 1909, allowing removal	11	9
Certificate of clerk	11	10
Plea	12	10
Trial	12	11
Verdict of January 10, 1911	13	11
Judgment of March 1, 1911	14	12
Order of March 2, 1911, fixing amount of bond	14	12

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	Original.	Print
Bill of exceptions	15	13
Plaintiff's evidence	15	13
Testimony of George Lindsay	15	13
Edward Slusser	24	20
Gus La Free	26	21
Joseph Miller	27	22
Arthur Daniels	28	23
Frank Conroy	29	24
Fred Brick	29	24
James Evans	30	25
Defendant's evidence	32	26
Testimony of A. H. Daniels	32	26
Frank Conroy	37	30
Frederick A. Hanses	38	31
Thomas Giblin	39	32
Herman Kramer	40	32
Frank Brick	42	34
Affidavit as to testimony of John Armstrong	43	35
Request for instructions to jury	45	36
Instructions to jury	47	38
Judge's certificate	56	45
Petition for writ of error	57	46
Assignment of errors	58	47
Order of April 24, 1911, allowing writ of error, etc	61	49
Bond	61	49
Writ of error	62	50
Return to writ	63	51
Præcipe for transcript of record	64	51
Certificate of clerk	65	52
Citation and service	66	52
Clerk's certificate to printed record	67	53
Appearance for plaintiff in error	68	54
Order setting for hearing	68½	54
Hearing and submission	69	55
Opinion by Sanborn, J.	70	56
Concurring opinion by Seaman, J.	78	62
Judgment	79	63
Note as to petition for rehearing	80	63
Order granting rehearing	81	64
Note as to reply to petition for rehearing	81	64
Order setting for hearing	82	65
Submission	82	65
Opinion *per curiam* on rehearing	84	66
Judgment on rehearing	87	67
Assignment of errors	88	68
Petition for writ of error	93	71
Allowance of writ of error	94	72
Clerk's certificate	95	72
Writ of error	96	72
Citation and service	97	73

a TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1910.

No. 1826.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE LINDSAY, Defendant in Error.

Mr. G. W. Kretzinger, Mr. L. L. Smith, Counsel for Plaintiff in Error.
Mr. James C. McShane, Counsel for Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Transcript of record filed May 23, 1911.
Printed record Filed Jul- 1, 1911.
EDWARD M. HOLLAWAY, *Clerk*.

1 *Placita.*

Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court rooms, in the City of Chicago, in said District and Division, before the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois, on Wednesday, the first day of March, in the year of our Lord one thousand nine hundred and eleven, being one of the days of the regular December Term of said Court, begun Monday, the nineteenth day of December, 1910, and of our Independence the one hundred and thirty-fifth year.
JOHN H. R. JAMAR, *Clerk*.

2 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Be It Remembered, That on this day to-wit: the fifth day of April, 1909, come the defendant in the above entitled cause by its attorneys, Messrs. Kretzinger, Gallagher and Rooney, and filed in

the Clerk's office of said Court, a certain transcript of Record from the Superior Court of Cook County, in words and figures following to-wit:

Record from Superior Court of Cook County to United States Circuit Court.

Gen. No. 270,324.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Pleas before the Honorable Willard M. McEwen, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and held at the court house, in the City of Chicago, in said County and State, on the first Monday, being the first day, of March, in the year of our
3 Lord one thousand nine hundred and nine, and of the Independence of the United States of America the one hundred and thirty-third.

Present:

The Honorable Willard M. McEwen, Judge of the Superior Court of Cook County.
John E. W. Wayman, State's Attorney.
Christopher Strassheim, Sheriff of Cook County.

Attest:

CHARLES W. VAIL, *Clerk.*

Be it Remembered, that heretofore, to-wit: on December 24th in the year of our Lord one thousand nine hundred and eight there was filed in the office of the clerk of the Superior Court of Cook County, a certain Præcipe which is in the words and figures as follows, to-wit:

Præcipe for Summons.

Filed Dec. 24, 1908.

Præcipe, Superior Court.

STATE OF ILLINOIS,
County of Cook, ss:

Superior Court of Cook County, December Term, A. D. 1908.

GEORGE LINDSAY, Plaintiff,
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY, Defendant.

Case. Damages, $20,000.00.

The clerk of said Court will issue a summons in the above entitled cause to said defendant in a plea of trespass on the case, to the damage of said plaintiff in the sum of twenty thousand ($20,000.00) dollars, direct the same to the sheriff of Cook County, to execute and make it returnable to the February Term of said Court, A. D. 1909.

JAMES C. McSHANE,
Plaintiff's Attorney.

To Charles W. Vail, Esq., Clerk.

Chicago, December 24th, 1908.

(Endorsed:) Filed Dec. 24, 2-57 P. M. 1908, Chas. W. Vail, Clerk.

Declaration.

4 And afterwards, to-wit: on the 11th day of February, A. D. 1909, a certain Declaration was filed in the office of the clerk of said Court, in words and figures following to-wit:

Filed Feb. 11, 1909.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 270,324. T. No. 21999.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Case. Damages, $20,000.

George Lindsay, Plaintiff, by James C. McShane, his Attorney, complains of Grand Trunk Western Railway Company, defendant, of a plea of trespass on the case.

For that, whereas, the plaintiff alleges that prior to and on, to-wit: the 21st day of September, 1908, the defendant, owned, possessed and operated a certain railroad which extended, among other places, from Chicago, Cook County, Illinois, into and through a part of another state or states, and it was then and there a common carrier by railroad, and as such was then and there engaged upon, by and in connection with its said railroad in commerce between the several states. And the plaintiff was then and there employed by the defendant in such commerce as a switchman to work and switch with a certain engine and certain cars, which it was then and there operating upon its said railroad line in its said business, and as such switchman, earned, to-wit: Ninety dollars per month. And the plaintiff further alleges that at the time and place aforesaid, to-wit: at Elsdon, in the county and state aforesaid, the defendant negligently, unlawfully, and contrary to the United States statutes in such case made and provided, hauled and used upon its said railroad line in moving interstate traffic a certain car equipped with a certain automatic coupler, which said coupler, owing to its improper construction and defective and inoperative condition of repair, could not be coupled from the side of said car without the necessity of its switchmen going between the end- of said car and the car or cars to which it was to be coupled.

And the plaintiff further alleges that it then and there became his duty to the defendant as such switchman to couple said car onto a certain other car then standing upon the same track and but a few feet from it, and as a direct result and in consequence of the said improper construction and defective and inoperative condition of said coupler, he was then and there required to and did go between the ends of said cars for the purpose of adjusting said coupler, so that said cars could be coupled together, and while he was so between the ends of said cars, and was engaged in adjusting said coupler for the purpose aforesaid, and while, as he alleges, he was exercising ordinary care and caution for his own safety, said cars were, without warning to the plaintiff, then and there shoved together and as a direct result and in consequence of his being so required to go, and being between the ends of said cars, as aforesaid, his right hand and arm were thereby then and there caught and crushed between said couplers to such an extent that it became necessary to amputate his said hand and arm, and they were shortly afterwards so amputated, and divers other bones, ligaments, muscles, tendons and membranes of his body were also thereby then and there sprained, dislocated, broken and otherwise injured, and he was cut, bruised and wounded about his head, face, limbs and body and sustained serious injuries to divers of his internal organs and a serious shock and injury to his spine and nervous system, and as a direct result of his said injuries he has ever since suffered and will continue permanently to suffer great pain, and has become and is permanently disfigured, crippled, sick, sore, disordered and incapacitated from attending to or transacting his regular business or any ordinary business or affairs, and he has thereby been and will continue permanently to be deprived of large earnings which he

might and otherwise would have made and acquired, and he has been compelled to and did incur, expend and lay out, and will continue to be required to incur, expend and lay out for medical attention, nursing, medicines and otherwise, divers large sums of money amounting to, to-wit: two hundred fifty dollars, in and about endeavoring to be cured of his said injuries, sickness and disorders, occasioned as aforesaid.

Second Count.

And, for that whereas, the plaintiff alleges that prior to and on, to-wit: the 21st day of September, A. D. 1908, the defendant owned, possessed and operated a certain other railroad which extended, among other places, from Chicago, Cook County,
6 Illinois, into and through part of another state or states, and it was then and there a common carrier by railroad and as such, was then and there engaged upon, by and in connection with its said railroad in commerce between the several states. And the plaintiff was then and there employed by the defendant in such commerce as a switchman to work and switch with a certain engine and certain cars, which it was then and there operating upon its said railroad line in its said business and as such switchman earned, to-wit: Ninety dollars per month.

And the plaintiff further alleges that at the time aforesaid, at to wit, Elsdon, in the county and State aforesaid, it became his duty to the defendant as such switchman to adjust the couplers of two of its said cars, which then stood upon one of the tracks of its said railroad and but a few feet apart, in order that said cars could be coupled together. And the plaintiff further alleges that while he was necessarily between the ends of said cars and engaged in adjusting said couplers, and while, as he alleges, he was exercising ordinary care and caution for his own safety, certain other servants of the defendant, who were also then and there employed by the defendant upon and in connection with the train in which said cars were then being placed, and which other servants, the plaintiff alleges, knew, or by the exercise of ordinary care in that behalf could have known, that the plaintiff was so between the ends of said cars, as aforesaid, and that if said cars should be shoved together, without warning to the plaintiff, while he was so between said cars as aforesaid, he would be liable and likely to be thereby seriously injured, yet, the plaintiff alleges that the defendant's said other servants, then and there wrongfully, negligently and without warning to the plaintiff, *negligently and without warning to the plaintiff*, caused and permitted said cars to be then and there shoved together, and as a direct result and in consequence thereof, the plaintiff's right hand and arm were thereby then and there caught and crushed between the couplers of said cars to such an extent that it became necessary to amputate his said hand and arm, and they were shortly afterwards so amputated, and by means of the premises the plaintiff sustained and incurred the injuries, disabilities, loss, damages, pain and suffering and obligations described and set forth in the first count of this declaration, and to

which said count for a description of the same he here refers.
7 To the damage of the plaintiff of $20,000.00, wherefore he brings this suit.

JAMES C. McSHANE,
Attorney for Plaintiff.

Petition for Removal.

Filed Mar. 2, 1909.

And afterwards, to-wit: on the 2nd day of March, A. D. 1909, a certain Petition was filed in the office of the clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

General No. 270,324. Term No. 21999.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Petition for Removal of the Above Cause into the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Your petitioner, Grand Trunk Western Railway Company, respectfully shows that it is the defendant in the above entitled cause; that said suit was brought by plaintiff against petitioner for the sum of twenty thousand dollars ($20,000) for alleged negligence on the part of your petitioner and its servants, resulting, as alleged, in damages to plaintiff in the above amount, as described in the declaration heretofore filed in this suit, and which is made a part of this petition.

That said suit is wholly of a civil nature and that the amount involved in said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in this suit is one which is wholly between citizens of different states, and which can be fully determined between them, to-wit: a controversy between plaintiff and petitioner; that petitioner is a foreign corporation and was at the time of the commencement of this suit and still is a non-resident of the State of Illinois, and was then and still is a corporation duly formed, created, organized and existing under and by virtue of the laws of the State of Indiana; and was then and still is a citizen and resident of the State of Indiana; that the plaintiff herein was at the

time of the commencement of this suit and still is a citizen and resident of the State of Illinois.

8 Petitioner further avers that the time within which it is required by the laws of the State of Illinois, and the rules and practice of this court to answer or plead in this suit has not yet expired; and your petitioner makes and files herein a bond in the sum of five hundred dollars ($500) with good and sufficient surety, for its entering into the Circuit Court of the United States for the Northern District of Illinois, a copy of the record in this suit, and for paying all costs which may be awarded by said Circuit Court if it shall hold that this suit is wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this court to proceed no further herein except to accept this petition and said bond and to make an order requiring said defendant to enter and file a copy of the record herein in the said Circuit Court of the United States as required by law.

GRAND TRUNK WESTERN RAILWAY COMPANY,
By KRETZINGER, GALLAGHER & ROONEY,
Its Attorneys.

STATE OF ILLINOIS,
County of Cook, ss:

L. L. Smith, being first duly sworn, on oath deposes and says that he is the duly authorized agent of the Grand Trunk Western Railway Company, defendant in the above entitled cause, and that he is authorized by said defendant to make and execute this affidavit, and does so on its behalf; that he has read the foregoing petition and knows the contents thereof and that the statements and allegations therein contained are true.

L. L. SMITH.

Subscribed and sworn to before me this 1st day of March, 1909.
[SEAL.] CLINT C. HINE,
Notary Public.

Bond.

Filed Mar. 2, 1909.

And on to-wit: on the 2nd day of March, A. D. 1909, a certain Bond was filed in the office of the Clerk of said Court, in words and figures following to-wit:

Know All Men by these Presents, that we Grand Trunk Western Railway Company, as principal and National Surety Company, a corporation of the State of New York, as surety, are held

9 and firmly bound unto George Lindsay, in the penal sum of five hundred dollars ($500.00) dollars, lawful money of the United States, for the payment of which well and truly to be

made, we bind ourselves and our heirs, executors or administrators, jointly and severally and firmly by these presents.

Whereas, Grand Trunk Western Railway Company, principal above named, has petitioned the Superior Court of Cook County, in the State of Illinois, for the removal of a certain suit therein pending wherein George Lindsay, is plaintiff and the said Grand Trunk Western Railway Company is defendant, into the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now, Therefore, The condition of this obligation is such that if the above bounden Grand Trunk Western Railway Company shall enter and file, or cause to be entered and filed, in the next Circuit Court of the United States in and for the Northern District of Illinois, on the first day of its next session, copies of all process, pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the said Superior Court of Cook County, and State of Illinois, in which George Lindsay is plaintiff and said Grand Trunk Western Railway Company is defendant, and shall pay all costs that may be awarded by said Circuit Court if said Circuit Court shall hold that said cause was wrongfully or improperly removed thereto, and shall also appear in said Circuit Court and enter special bail in such cause if special bail was originally required therein, and shall do such other appropriate acts as by the Act of Congress in that behalf are required to be done upon the removal of such suit from said State Court into the United States Court, then this obligation to be void, otherwise of force.

Witness, our hands and seals, this first day of March, 1909.

[SEAL.] GRAND TRUNK WESTERN RAILWAY COMPANY,
By J. J. ROONEY, [SEAL.]
Attorney in Fact.
NATIONAL SURETY COMPANY.
E. A. ST. JOHN, [SEAL.]
Resident Vice-President.
HOMER H. McKEE,
Resident Assistant Secretary.

Approved:
WILLARD M. McEWEN, *Judge.*

10 And on to-wit: on the 2nd day of March A. D. 1909, a certain Notice was filed in the office of the clerk of said court, in words and figures following to-wit:

Notice.

Filed Mar. 2, 1909.

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

General No. 270,324. Term No. 21999.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

To James C. McShane, Esq., Attorney for Plaintiff:

Please take notice that on Tuesday, March 2, 1909, at 9:30 o'clock A. M. or as soon thereafter as the matter can be heard, before his Honor, Judge McEwen, in the court room usually occupied by him in the court house, we shall present the petition and bond of the Grand Trunk Western Railway Company for the removal of the above entitled cause into the Circuit Court of the United States, for the Northern District of Illinois, Eastern Division, and ask that an order be entered approving said bond and removing said cause into said Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in accordance with the prayer of said petition. At which time and place you may appear if you see fit.

KRETZINGER, GALLAGHER & ROONEY,
Attorneys for Defendant.

Received a copy of the above notice, together with copy of petition for removal therein referred to, this 1st day of March, 1909.

(Signed) JAS. C. McSHANE,
Attorney for Plaintiff.

And on to-wit: March 2nd, A. D. 1909, the same being one of the days of the March Term of the Superior Court, the following among other proceedings were had and entered of record in said Court, to-wit:

11 *Order of Mar. 2, 1909.*

270,324.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Case.

On motion of defendant's attorney, and on filing petition and bond it is Ordered that this cause be and is hereby transferred to the

United States Circuit Court in and for the Northern District of Illinois, Eastern Division, and that the Clerk of this court forthwith transmit to said United States Circuit Court a full and complete transcript of all papers and pleadings filed herein together with all orders made and entered of record in said cause.

Certificate of Clerk.

STATE OF ILLINOIS,
County of Cook, ss:

I, Charles W. Vail, Clerk of the Superior Court of Cook County in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete Transcript of the Record except a certain Summons filed in my office January 16th, A. D. 1909, in a certain cause lately pending in said Court on the law side thereof, wherein George Lindsay was plaintiff, and Grand Trunk Western Railway Company, defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Chicago, this 31st day of March, A. D. 1909.

[SEAL.] CHARLES W. VAIL, *Clerk.*

(Endorsed:) Filed April 5, 1909, H. S. Stoddard, Clerk.

And on the same day to-wit: the fifth day of April 1909, come the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Plea in words and figures following to-wit:

12 *Plea.*

Filed Apr. 5, 1909.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Dvision.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Case.

And now comes the defendant, by Kretzinger, Gallagher & Rooney, its attorneys, and defends the wrong and injury, when, etc., and says that it is not guilty of the said several supposed grievances above laid to its charge, or any or either of them, in manner and form, as plaintiff has above thereof complained against it, and of this it puts itself upon the country, etc.

KRETZINGER, GALLAGHER & ROONEY,
Attorneys for Defendant.

(Endorsed:) Filed April 5, 1909, H. S. Stoddard, Clerk.

Trial.

And on to-wit: the ninth day of January, 1911, being one of the days of the regular December, 1910, term of said Court, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, District Judge, appears the following entry to-wit:

29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

This cause again coming on to be heard, now come the parties by their attorneys, and come also the following jurors, to-wit: Quincy Wimple, Ernest Ginter, Alexander Le Claire, H. P. Lowry, C. K. Halverson, Joshua Rogers, Jesse Richardson, John Wagner, Wm. H. Selleck, E. O. Bergeson, Wm. Hallowell and J. W. McMillan, who were all duly elected, tried and sworn to well and truly try said issue and a true verdict render according to the law and the
13 evidence. And the opening statements for the plainti- being heard, and the opening statements on behalf of the defendant being reserved, thereupon the evidence for the plaintiff is heard in part, and the hour for adjournment having arrived, the further trial of this cause is postponed until tomorrow morning.

Verdict of Jan. 10, 1911.

And on to-wit: the tenth day of January, 1911, being one of the days of the regular December 1910, term of said court, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, District Judge, appears the following entry to-wit:

29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Now again come the parties by their attorneys, and come also said jury, and the evidence for the plaintiff is further heard and concluded when the defendant moves the Court to direct the jury to find said defendant not guilty, which motion is overruled by the Court, the defendant excepting thereto.

Thereupon the evidence on behalf of the defendant is heard to conclusion, and the arguments of counsel being made, the Court instructs said jury who retire to deliberate upon a verdict, attended by a sworn bailiff of this Court. Afterwards on this same day come said jury and return their verdict in open Court, finding the defendant guilty and assessing the plaintiff's damages at Thirteen Thou-

sand Dollars ($13,000.00). Thereupon the defendant enters its motion for a new trial, which motion is entered and continued for argument.

And on to-wit: the first day of March, 1911, being one of the days of the regular December 1910, term of said court, in the record of proceedings thereof, in said entitled cause before the Hon. George A. Carpenter, District Judge, appears the following entry, to-wit:

14 *Judgment of Mar.* 1, 1911.

29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

The Court having considered and being now fully advised in the premises, it is Ordered that the motion of the defendant for a new trial be and the same is hereby overruled, to which ruling of the Court the defendant excepts. It is further Ordered that the motion of the defendant in arrest of judgment be and the same is hereby overruled, to which ruling the defendant excepts. It is thereupon Considered and Adjudged by the Court that the plaintiff do have and recover of the defendant the sum of Thirteen Thousand Dollars ($13,000.00) so as aforesaid assessed, together with the costs herein to be taxed and that execution issue therefor.

Order of Mar. 2, 1911.

And afterwards to-wit: on the second day of March, 1911, being one of the days of the regular December, 1910, term of said Court, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, District Judge, appears the following entry to-wit:

29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Upon motion of defendant, it is Ordered by the Court that said defendant have sixty days in which to file the bill of exceptions herein, and it is further Ordered that the Bond on writ of error be fixed at the sum of fifteen thousand dollars ($15,000.).

And on to-wit: the twenty-fourth day of April, 1911, there was filed in the Clerk's office of said Court in said entitled cause a certain Bill of Exceptions in words and figures following to-wit:

15 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

No. 29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Bill of Exceptions.

Be it remembered that heretofore, to-wit, on the 9th day of January, 1911, at the regular December Term 1910, of said Circuit Court, the above entitled cause came on for trial upon the issues joined here, before the Honorable George A. Carpenter, presiding judge, and the jury was duly impaneled and sworn, whereupon the parties respectively offered and introduced the following evidence, and the following evidence was rejected, and objections and motions were made and instructions given and refused, and rulings of the court were entered, and exceptions duly taken by the parties, all as follows, to-wit:

Appearances:

James C. McShane, Attorney for Plaintiff.
George W. Kretzinger and L. L. Smith, Attorneys for defendant.

PLAINTIFF'S EVIDENCE IN CHIEF.

Testimony of George Lindsay.

GEORGE LINDSAY, testified:

My name is George Lindsay. Am twenty-five years old; was twenty-three years old at the time of the accident, which happened September 21, 1908. Was working at that time for the Grand Trunk Western Railway Company, as switchman. There were three men in the crew. Arthur Daniels was conductor, Frank Conroy was head switchman and I was hind switchman. The two other men are still in the employ of the company. We had switch engine 1280. The engineer was John Armstrong. He is now in London. The fireman was Frank Lang; he is still working for the Company.

16 The railroad runs from Chicago through Indiana and Michigan, into Canada and points east. The accident happened in the Elsdon yards in this city. Elsdon Yards is about 30 miles from the Indiana state line. And the road hauls freight and passenger trains from eastern points to Chicago and from Chicago east. I had been a switchman about four years, and went to work on the evening of the accident at six o'clock. The accident happened about 6:40 o'clock. It was dark at that time. We had

lanterns. We got four cars off of 18 and set them on the westbound main. 92 is a merchandise train. It is a through train and runs from Chicago east. It was the custom to get to Elsdon yards about seven o'clock, starting from Chicago, and the crew was accustomed to put out cars for that train every night. There are two main tracks for Elsdon, running through the yard, north and south. The East track is used for westbound traffic. One of the main tracks the west one is eastbound main and the next track east of that is westbound main, and east of it and alongside and running parallel to it is a yard, *had* track, and alongside of that and branching off of it are a number of side tracks, of which number 18 is one. This accident happened north of 51st street, which runs east and west. There was a connection between the eastbound and the westbound main, south of 51st street; which ran northeast and southwest. There is also a connection which runs the same way leading from the east track to the lead track which is east. All of these connections are south of 51st street. From the south line of 51st south to the north end of that connection from the yard lead to the west bound main track is 65 feet. It is 252 feet from 51st street south to the north end of the connection connecting the two main tracks, and it is about 415 feet from 51st street to the point where I was hurt. From the connection east bound main to 51st St. is 426 feet. From the yard lead switch to westbound main cross-over is 186 feet. From westbound switch to eastbound main switch is 240 feet. 51st street is about 66 feet wide. From 51st street to 18 switch is 66 feet; that is north of 51st street. These four cars were on the westbound main, just north of 51st street. Then I cut off the engine and went south to clear the connections, waiting for this beef run to come from the stock yards. Then I went south of this cross-over that connects the two main tracks and stood there on the westbound main, and a couple of minutes after that the beef run ar-
17 rived. James Sanders had charge of the switch engine, Joe Miller and Josh Nevins were in the crew that brought it in. They arrived at Elsdon from the north. They pulled down the eastbound main south of this connection and then shoved their train through the connection up to the westbound main against these four cars. At that time I was right at 51st street. The knuckles on the couplers were both open. These couplers are so constructed that when the knuckle is open if the couplers are in operative condition they will couple themselves when they come together. The beef run engine pushed its cars north just to clear the connection, so that they would cut off. They had hold of about 15 cars, and then that left on the track 19 cars. They cut their engine off and went to the round house. They were through. Our light engine coupled on to them. The conductor and I went along and bled the air and looked at the cards to see where they were billed for. They were all east cars, to go east of Buffalo, New York and Boston. There were no cars for Illinois. When I got down to the north end of this beef train I saw that the cars of the beef run and the four cars we had set in there were separated about a car length, and I got hold of the knuckle on north end of the north car of the

15 cars and tried to close it but it would not close all the way, so I got hold of the pin lifter and knuckle and tried to work both of them. They would not close. The conductor told me to cut off the north car of the beef run, and I pulled the pin lifter and gave them a sign to back up south from the connection, and I walked over south to number 18 switch, and they backed up south. Then they took all the cars off that track except the four that were there before and the north one of the beef run. Then they came north through the connection on to the yard lead and kicked the three cars north in on one side track number 18. I then threw the switch and they kicked three ice empties down to the yard lead. These were the next three cars of the string we had hold of. Then I walked back on the westbound main to the south end of this car that was standing there. They kicked five cars down the westbound main on this car. And that coupling was made and they kept on running and hit these four cars and the coupling still did not make. The knuckle was open. The coupler I have spoken of heretofore as working with, was on the north end of the north car of the beef run. It would not make the second time. Then I got hold
18 of the knuckle and tried it with the pin lifter and I left the knuckle open and went over to 18 switch, and we had hold of about three cars and coupled on to these three cars that he had kicked in there previous, and then gave them a sign to back up and we went south over the connections and came north on the west bound main and coupled on to these six cars. After they started south I went North to this opening, to the south end of the four cars and the north end of the beef run. I got there about the same time they did. Daniels made the coupling on the south end of these six cars and let them come north, and they bumped against the four cars and they went apart about two feet, and I gave him a "hard stop and stand" signal which shows that I am going in to do some work between the cars. The signal is a hard swing crosswise, in a semi-circle, with a lantern. That signal means to stop and stand there until you get another signal. At that time the cars were just about stopping. I was on the east side of the car. They stopped before I went in. I was working on the east side, right along, and the men were on that side when they made the other switches. Daniels was standing about at 51st street.

The engine was headed north so that the engineer's side would be the east side. Conroy was up about 51st street. I could just see their lanterns. It was too dark to recognize anyone. There was a car oiler close to me, when I gave that signal, named Frank Brake. He was on the east side. After I gave this signal the draw bars or bumpers stood about two feet apart. Then I went in and stood on the east side of the bumper and got hold of the knuckle and pin lifter again and tried to work it. The pin lifter is the attachment along the dead wood that you open the lock with. It is on the end of each car. There is at the end of each car from the center of the car to the outer edge of the car a rod and at the end of that rod there is an arm, perhaps a foot long; that is called a pin lifter; and on the inside end of that rod there is an arm that extends out over

the top of the coupler, and from the outer end of that arm there is kind of a chain down to the top of the coupler. I had hold of the pin lifter on the end of the car on that crank with my left hand and with my right hand was trying to work the knuckle and tried to shove it in. My lantern was on my thumb on the right hand. I could not get the knuckle all the way closed and then I put my hand in. I made five or six attempts. I put my hand back in the coupler to try to shove the block over to see if I could get it
19 to work. When I had my hand in there the cars came ahead on me all of a sudden. The knuckles closed and just pulled my arm right in and smashed it. They took the whole arm and pulled it right in, and it cut the top of the lantern off. I gave no other signal to them after I gave the hard stop and stand signal. I don't know of anybody else giving them any other signal to go at the time. It was one or two minutes from the time I went in there until they started back. When I was working there I was facing southward. The car was standing there during all that time. They came back fast. I had no chance to get my hand out; I might have got it out a little bit, but did not get it free. It was smashed flatter than a ham, away up above the elbow. My arm was amputated so that I have not quite three inches of a stump. I am five feet, eleven inches tall, weight 155 ponds. I am lighter than I was then, I weighed then about 165 pounds. When I caught in there they kept shoving ahead northward and I walked backwards with my arm in there, part of the car length. I hollered and they stopped. The cars did not couple at that time. They separated again. This was the fourth attempt at making the coupling. After the north end of the beef car struck the south end of the first car the first time the knuckle on the south car was closed but before it struck the first time it was open. There was a slight curve at that place. It is only necessary to open one knuckle. I did not find out when working in there what was the matter with the knuckle. I got hold of the block and the lock, just got my hand on the lock and was just trying to shove it from one side to see if I could get it to work when they came ahead on me. It was a tower coupler. There are different kinds of them but they all couple with each other.

I was born in Chicago; lived here all my life. Before I went to work for the Grand Trunk I was switching on what they call the Pittsburg, Alleghany & McKee's Rock Railroad at Pittsburg. Before that I was yard clerk there for a couple of years on and off for the Grand Trunk Western. I lived out there close by. I earned as switchman at the time of the accident on an average of about $110.00 to $115.00 a month. After the accident I walked up to 51st street and the oiler got hold of me and brought me over to the office and set me down, and tied up what they could of my arm so I would not bleed to death, and then they put me on my engine and
20 brought me down to 49th street and Ashland. From there they had an ambulance and brought me to the Englewood Hospital. They cut my arm off that night. Dr. Rees operated on me, the head surgeon there. I remained in the hospital 15 days. It was a year before I was able to work. The first work I did was for

Harry Gibbons' Box Factory. I kept tab of how many boxes each nailer turned out each day. I worked there a year and earned two dollars a day and then I went to work for the Chicago & Alton throwing switches. I was idle between the time I left Gibbons' Factory and went to work for the Alton a week or nine days, and I have been working there ever since earning $55.00 a month. My arm still pains me. I been got a steady pain with it all the time, The change in the weather has nothing to do with it. They call it the nerves. The hand seems to be cramped up like it was put to sleep all the time. A change in the weather does not effect it at all, just as good or bad one kind of weather as another. Once in a while I get a shock like a needle was in it and the stump will fly up.

Cross-examination by Mr. KRETZINGER:

I began to make up this train at the Elsdon Yards. The first of these two trains started from Taylor street, Chicago, I don't know how many cars were taken from Taylor street out to Elsdon yards that night. If they have not enough cars they will fill out with these cars of meat that come from the stock yards. When the train got to Elsdon there were about 15 cars in it from the stock yards. There were three empties of these fifteen and the rest were all loaded with dressed beef and called beef cars They put in 12 of these beef cars at Elsdon; that made 16 cars on the train There were about 15 cars in the train that came from the stock yards, and this one we cut off was the north car of the beef run and it was left standing on the main track; And next I walked over to 18 switch and threw 18 switch and they kicked three cars of the 14 in on track 18. Then I threw the switch on the main for the yard lead and they kicked three ice empties down the yard lead. The car I got my hand hurt on was on the beef run. I cut that car off, the north car of the beef run, and that car was left standing on the main track. These 12 cars were pushed down to that car and the north one of these 12 cars was pushed up to this car to couple. I claim the north end of
21 the car I cut off, left on the main line, was defective; that was standing on the westbound main line with four cars north of it. The beef run shoved their train down the westbound main on our four northward, to clear the connection. Then they cut off their engine and went to the round house and our engine came north and coupled on to them. I was on the east side of that car and I took hold of the pine and knuckle and could not close the k-uckle together. It would not close all the way. I did not call one of the inspectors and call his attention to the condition of the knuckle. It was not my duty to do that. I did not know what was the matter with it at the time; that is wha- I was trying to find out. There are inspectors around there. It is supposed to be inspected and if it is in bad order they put a "bad order" card on it. If I discover a coupler won't work I try to fix it myself if I can and if I can't fix it I notify the conductor, call the conductor. Then it is the duty of the conductor to take the car out if he cannot fix it. I notify the conductor and it is in his hands after that. There were several cars there and I was standing there and the conductor was

making the other coupling. They have made switches before that. We had kicked these three cars in on 18 and then threw down the yard lead these three ice empties, and then backed south over the connections again and kicked five cars down the westbound main against this meat car. I was standing on the south end of the car; and that coupling was made and those six cars went against these four. This coupling did not make; the coupler on the north car I mean was out of order Swift's Refrigerator Line Number 7979. Both of these cars had a pin lifter. The knuckle was open on the other car. That coupling made all right. That was not the time I was hurt. There was a pin lifter on the car ahead of it that I was going to couple on to it on the opposite side, that was closed. The lifter on the meat car was on my side. I tried the coupler on the car that was advancing; that would open; that was in order; that is the NYD. They kicked five cars down after they had kicked these three down on 18 and three down the yard lead. They kicked five down the westbound main against this one car and that coupling made; that made them six, and those six ran north and bumped into those four, and then I went over south of 18, and we had hold of three cars then and coupled on to three more cars. I gave them a signal to back up and they backed up and went south over the connection of the westbound main then came north and
22 while they were backing south I walked over to this opening between these six and four cars and conductor Daniels made this coupling of the standing six cars and this six that we had hold of, and then left them come ahead and they bumped against these four and I just see them bound open a little and I gave him a hard stop and stand signal, and they were just about stopped then. That was not when my hand was caught. Then I gave them this hard stop and stand signal and they were stopped when about two feet apart, and I got hold of the pin lifter and knuckle and tried to work it again, but it would not work. The knuckle would not go all the way closed, so I put my hands inside the draw bar. That was SRL 7979, that is on the end of the east bound, the north end of the standing train i. e. the north end of the beef run. Then after I worked the knuckle and pin lifter four or five times I jerked it and could not get it to work. I put my hand inside the draw bar and tried to shove the lock over to see if I could get it to work, and then all of a sudden the car came ahead when I was in there working this and it caught my hand. I did not have a chance to get my hand away. At that time I had only given the stop and stand signal. Before that I gave a hard stop and stand signal and they stopped and they were about two feet apart. They just bumped against these when Daniels made his other coupling. When I seen the coupling did not make I gave this stop and stand signal.

After that it was a minute or two when my hand was caught. In the meantime they were standing up there at 51st street, and I had my hand inside of the coupler trying to get hold of the lock block. I had my finger against it trying to shove it to one side to see if it would work. The coupler of the NYD was closed. It closed by contact with the car in front of it and when the coupler

closed by contact it did not make. The knuckle was open all the time i. e. in the SRL car the north knuckle was open and in the NYD it was closed. I did not try the pin and knuckle on the NYD car. It was only open when the beef train shoved their car down there, and it was closed after that all the time, but I did not try to close it at that time. The coupler on the NYD car was all right. Daniels was standing at 51st street, south of me at the time, about 13 car lengths. Conroy was a little south of Daniels, a car length or two. At that time I did not give the go ahead signal, the come ahead signal to the engineer. I made no motion at all, only
23 the stop and stand signal. I could not tell from what I observed at that time what the matter with the coupler was. I had been working for the Grand Trunk at that time about three years, switching. At the time of the accident I was on the east side of the car. There was a little slight curve there. It is customary every day to make a coupling with one knuckle open. This knuckle entered all right but it would not lock. It was about one or two minutes from the time I attempted to lift the pin with the pin lifter until the accident. After I was injured I saw Frank Brake, the car oiler, the conductor and head man. I saw the conductor before I attempted to go in there to make the coupling. I did not notify the conductor that the coupling was defective. Nobody told me it was defective. I was trying to see what the matter was, the reason it would not drop. I did not tell him anything about it.

Redirect examination by Mr. McSHANE:

I did not see the conductor or other switchman after I went between the cars. I could not see them. The curve did not have anything to do with this coupling. A real sharp curve would prevent them from entering, but there was not any sharp curve there. When closed, the couplers enter and a curve makes no difference, and these couplers were in there. And so in operating this coupler, when you say the car was apart it does not make any difference whether the car was standing on a curve or straight track. When two cars are coupled together if one of the coupling apparatus is all right either one of them may be uncoupled. This knuckle when it came together was still open. When a coupling is made both knuckles must close.

Q. Would it have helped at all if you had opened the other knuckle?

A. No, sir.

Mr. KRETZINGER: I move to strike that out. He is asking what would have happened, if he opened the other knuckle.

The COURT: It may stand.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

I could raise the pin a little. I don't know whether it raised fully or not. All the cars I had were going to eastern cities.

Recross-examination by Mr. KRETZINGER:

When two couplers come together both of the bars has got to lock. When one locks it won't do a bit of good. If one of them is open it locks. But if both are closed they won't lock, and it does not make any difference how good one is if the other is not open it won't lock. When I gave the signal to stop and hold fact. I got a response to it. They swung down answering my signal. They I went in there. The conductor answered the signal. He gave his signal to stop and then I went in there. I seen Conroy. He answered the signal. They both gave the stop signal, and they did stop in obedience to my signal, and I understood they were obeying my signal. I did not ask them to back up without another signal but they did and that is how I got hurt. I was one or two minutes working at the knuckle and trying to get it to work. When a knuckle is broken it is open so that when they come together the pin drops. In car 7979 it would not drop. It was up all right, some but not fully up. Some of these couplers are made so that when the knuckle is closed and the pin is raised up it drops a pin behind it.

Testimony of Edward Slusser.

EDWARD SLUSSER Testified.

Direct examination by Mr. MCSHANE:

My name is Edward Slusser, Am thirty years of age. Am car inspector for the Grand Trunk Western Railway, the road Mr. Lindsay was hurt on. Am still working for the company and was working there the night of the accident. There were two inspectors working there at the time, myself and La Free. I went to the place and learned of the accident about twenty minutes after it happened. These cars were supposed to be inspected by the men at the stock yards. I did not have anything to do with them. I saw the coupler on the north end of this S. R. L. 7979, where Lindsay was hurt. When I got there the knuckle closed, and I gave the lever a hard pull and it opened, and I tried to shut it again but it would not shut by shoving the knuckle, so I got hold of it with my left hand and shoved the knuckle and it closed, and then I pulled the lever up and it would not unlock, and I tried it again and it would not
25 unlock, so the yard master asked me what to do These cars were to go on that 19 train and I told him to set it out, and I had sent for Mr. Kramer, the chief car inspector, as our instructions were, so they set it out. 18 and 19 would not come until about 7:10 or 7:15. Mr. Kramer came and he gave the lever a jerk and it would not open. The I-bolt that runs from the lock to the chain was bent, as though somebody had either hit the knuckle pin or hammered on it trying to knock it down. Sometimes it would open and sometimes it would not. You could close it by raising the chain with your hand and shoving it in. The pin would draw the I under the edge of the coupler. Mr. Kramer ordered me to remove it and the oilers put in another lock and he took the old lock to his office.

The car was held for that train. The next train after that is 92. If a car don't get on 92 we send it on 94, which leaves about nine o'clock. They were in the habit of getting a number of beef cars every night at the yard. When I got up there Mr. Gus La Free, the other inspector was there. There were eight or nine men around where the man was hurt, mostly train men. I did not see the accident. It takes about three minutes to take one of these locks out and replace it. There was supposed to be a supply of them around there. I have not seen the lock since. La Free is still working for the company and so is the head Inspector Kramer. He lives close by, about six blocks and I sent for him to come over that night.

Cross-examination by Mr. SMITH:

I was employed as a car inspector at that time I was supposed to inspect all cars from the east and foreign roads, and I had a partner. We were not to inspect cars from the yards. We had an inspector at the yards to do that. The switching conductor told me to examine this car when I came down through the yard. He told me there was an accident there. There were eight or ten people around there when I got there. The knuckle was closed when I first saw it. I tried the pin lifter and gave it a jerk and it opened. This lever extends to the corner of the car. It opened the first time, then I tried it again and it would not open. The I-bolt and the first knuckle looked as though it had been hit, just marked, just a dent in it as though it had been struck with a piece of iron. The I-bolt was bent about five eighths of an inch. The I's I suppose are about one-half an inch and the iron is three-eighths or
26 one-half inch thick. The bolt was bent over. The openings are about one-half inch. The I's in all were bent, bent between the two I's. The I's are supposed to be the same size, and it was bent about five-eighths of an inch. The bend would catch on the edge of the hole. The knuckle was closed and I opened it, and the next time the bolt went down and caught hold.

Redirect examination by Mr. MCSHANE:

The hole over the top of the coupler, through which this thing would work up and down, is from one and one-half to two inches. It is no trouble to get that down at all.

Testimony of Gus La Free.

GUS LA FREE Testified.

Direct examination by Mr. MCSHANE:

My name is Gus La Free; am forty-four years old. I am car inspector for the Grand Trunk, still working at Elsdon. We had nothing to do with these beef cars. The Union inspector inspected these when the cars arrived first. I went up to the place where this man was hurt with Mr. Slusser. I tried to open the lock with the

lever, but it would not work. I tried in the ordinary way just the same as we usually do, but it would not work. Mr. Slusser sent me for Mr. Kramer and I went away. I came back with Kramer and I had some other work to do so I don't know anything more about that car. I did not see Kramer try to work it. The top of it looked like it had been battered. I went away pretty quick to report to the head man, and when I came back I had nothing further to do with it.

Cross-examination by Mr. KRETZINGER:

I took hold of it the same as we always take hold. I saw the pin stuck and let it alone. I did not try to get hold of it and pull it again. I only tried it once. I only made the usual effort.

Redirect examination by Mr. MCSHANE:

All I know is I did not get it open and then went up to the head man.

27 *Testimony of Joseph Miller.*

JOSEPH MILLER testified:

Direct examination by Mr. MCSHANE:

My name is Joseph Miller; am twenty-nine years old. I am switchman for the Grand Trunk, still working for the same company. Was on the beef run that night. My crew brought these cars from the stock yards to Elsdon. I was the rear man. Got them in the stock yards off track 17. We brought in a cut of cars every night from Elsdon. Generally, it was our regular work. In going from the stock yards the engine was on the west end of the train pulling it. That would leave the engine on the south end at Elsdon. On leaving the yards I got on the west end of the train from the yards. I tried to close the coupler on the north end of the car with my foot. I was standing on it, the brake staff is at that end of the car, and when I was on the brake staff I tried to close it with my heel. I had my heel there so I would not slip off, and I tried with my heel. It would *got* go in at all. I had my heel against the knuckle trying to push it in. It had a lock but it would not go in. When I tried this the train was on the main line, coming from the stock yards. This was the north coupler of the string as they were shoved in at Elsdon and I shoved them against these other cars. When they were shoved in I stood there at 51st street. After I came in over the cross-over the engine cut off and I was there. I had not went home. That was the end of my day's work.

Q. In the ordinary working of these couplers when they are in ordinary repair can a man shove them in with his heel as well as his hand?

Mr. SMITH: I object to that.

A. Yes, sir.

The COURT: You claim he is not qualified?

Mr. SMITH: Yes, sir, and it is a conclusion, and upon these grounds ask that the answer be stricken out.

The COURT: It may stand.

To which ruling of the court the defendant, by its counsel, then and there excepted.

Cross-examination by Mr. SMITH:

I don't know what the number of this car was. Only what I heard. I could tell you what the initials were—S. R. L. I
28 don't know the number of it. I don't know whether this is the car that caused the injuries.

Mr. SMITH: I move to strike his evidence out.

The COURT: The motion is overruled.

To which ruling of the court the defendant by its counsel then and there excepted.

I did not try to close this knuckle with the lever. I knew there was a lever there not to close it but to open it. It can only be opened with the lever, the pin lifter. The only effort that I made to close it was with my heel.

Testimony of Arthur Daniels.

ARTHUR DANIELS testified:

Direct examination by Mr. MCSHANE:

My name is Arthur Daniels; am forty-six years old. I am a switchman for the GrandTrunk. Was subpœnaed down here with all these Grand Trunk men. Was the conductor of the crew on which Lindsay was working. He was field man. After this accident I took him to the hospital. When I came back I seen the car in question S. R. L. 7979. Mr. Kramer and Mr. Slusser were the two inspectors examining it. I saw Mr. Kramer try to open the north coupler on it. I saw him pull the lever. It would not open the first time. Finally he got it open. The pin finally came out. I think he took both hands and gave it an extraordinary jerk and he got it open. They took out the lock. He had a man get a new lock and the car went out then. The car was set out of train 92 and laid over at Elsdon until train 94. This car was going to some place in New York. All these beef cars were bound for points east of Buffalo. The train did not haul anything but through freight nothing this side of Port Huron.

Cross-examination by Mr. SMITH:

When I first seen the car the knuckle was closed and Kramer was there at the time and he opened it. I don't remember but he tried it twice and the second time he tried it he got it opened. It took more effort to open it than he used the first time. I think he took

both hands the second time when he opened the knuckle. It did not open easily. He had to jerk it. I don't remember whether he braced himself or not, but he took both hands and jerked.

29 *Testimony of Frank Conroy.*

FRANK CONROY testified:

Direct examination by Mr. MCSHANE:

My name is Frank Conroy; am forty-two years old and a switchman for the Grand Trunk. I was subpœnaed here with the rest of the men. Am still working for them. I was a member of this crew that Lindsay was in on the night of the accident. After it happened I saw car S. R. L. 7979. I was there when they tried to open the North knuckle and could not open it. They tried to open it by pulling on the lever, did not work at all. I pulled on it two or three times, may be. I did not get it open.

Cross-examiantion by Mr KRETZINGER:

I gave two or three jerks on it and it would not open and I never saw it open. I was there when Mr. Daniels was there, and I did not see the pin open. I was not there when Kramer was there. So far as I am personally concerned, I don't know that the coupler was ever opened.

Testimony of Fred Brick.

FRED BRICK testified:

Direct examination by Mr. MCSHANE:

My name is Fred Brick, am twenty-nine years old and am a car oiler for the Grand Trunk Railroad. I go along and put oil in the boxes. At the time of this accident I had already oiled four cars and started on the back cars. I saw Lindsay when the cars came together and before he went in between them. They did not couple. I did not see Lindsay do anything, I was looking at the cars, packing boxes. I did not see him go in there. I was east of the place where he was hurt. I come from north and go south. I was only about four or five feet from the place where the cars came together. I remember the cars starting back when he was hurt. I do not know of any signal given the conductor. I did not give any. I was the second car back, about a car and a half from it. Lindsay did not give any signal this time the cars came back and caught him. The first signal Lindsay gave was to start and the second was to stop,
30 hard stop sign. I did not see him give any other signals; that is the last signal I saw Lindsay give, just one. I heard him holler afterward. At the time he gave that signal to stop I was within three or four feet from him; just started working on these cars going south, and I was a car and a half south of him when I heard the cry at the time the train started. I did not see anybody

signal to come back and I gave no signal. There was nobody else on that side with a lantern but myself and Lindsay, and when I heard him holler I went over to him. I found him just at the crossing. The four cars did not make and they were standing a little further north, and these cars were stopped and Lindsay was just ready to come out from between the cars. I saw his arm; it was mashed and his lantern was lying on the ground. The handle of the lantern was cut off. I brought Mr. Lindsay up to the station. He just hollered: "Oh, my arm" and after that I did not see anybody swing the train to stop. From the time the train moved until it stopped it moved only four or five feet.

Cross-examination by Mr. KRETZINGER:

I saw Lindsay's first signal with his lantern to stop when he got down on them four cars. I was kind of hurrying with the work and I stepped up to these cars and commenced oiling the boxes I went away from there. I did not see him make any other signal after that and I don't know anything about what kind of a signal he did make after that. I did not look at all. I was engaged in my work until I heard him holler. When he hollered I just put my tools on the ground and walked up to him. Just before I heard him holler I was packing boxes for oiling. I was not looking at Lindsay then and don't know what he was doing.

Testimony of James Evans.

JAMES EVANS testified:

Direct examination by Mr. MCSHANE:

My name is James Evans; am forty-three years old. Am a railroad man and was working for the Grand Trunk Western Railway Company at the time Lindsay was hurt. I was acting as night yard master that night. When taking this cut of beef cars from the stock yards to Elsdon they headed out of the yards the south
31 end so that when they coupled on to the train in the yard the engine is at the east end, and then pulls out south and goes west so that the west car at the yards would be the north car of the tracks at Elsdon. I saw this S. R. L. 7979, the car that Lindsay was hurt on. When I got instructions to throw the car off for inspection I put it out. I tried to open the knuckle. I gave the lever three or four jerks and I could not open it. Then I went and fingered the chain and lock and I kept on working at it and I had this hand on the lever pulling the chain and I did not release it until I got the I-bolt up through the top of the hole in the draw bar; then I gave it a jerk and it opened. I tried to close it and had the same difficulty closing it that I had in opening it. I was there when Mr. Kramer, the chief inspector, came. I seen him jerk on it. And it would not open. The car was held out until 11:00 o'clock train 94. Then it was sent on east. I did not see the accident myself.

Cross-examination by Mr. SMITH:

I got down after the accident on No. 18 where this car was thrown out. I did not see the car before the accident. Mr. Slusser and Mr. Le Free were there then I made the examination of his car. Mr. Slusser tried to open it. I did not see Le Free try it at all.

Redirect examination by Mr. MCSHANE:

In taking this cut of beef cars from the yards to Elsdon they do no switching between the yards and Elsdon, just pull them over and then the crews put them in station order and switch them, so that when the through train comes on — them and couples them on to the train.

Thereupon plaintiff rested his case.

Motion by defendant to instruct the jury to find the defendant not guilty. Motion denied by the Court. To which ruling of the court the defendant, by its counsel, then and there duly excepted.

32 DEFENDANT'S EVIDENCE.

Testimony of A. H. Daniels.

A. H. DANIELS testified:

Direct examination by Mr. SMITH:

I was a witness yesterday and I was foreman with this switching crew. The switching crew consisted of John Armstrong, the engineer. Frank Lang, the fireman, Frank Conroy, George Lindsay and myself, switchmen, and I was foreman of the crew. I remember an accident that happened to Mr. Lindsay about six o'clock the 21st day of September, 1908, and I remember the time he was hurt. There is a train called 92 that goes out of the city of Chicago every night and pulls out at Elsdon to the rating of the engine whatever it might be; but on this particular night they were to pick up 16 loads; four of these loads were at Elsdon and 12 of them were to come from the beef track. The engine arrived at the beef track and shoved these cars that they brought down onto the westbound main track where the four were standing. The engine was charged with air and when the crew that brought the beef train cut their engine off we coupled on. Mr. Conroy and Mr. Lindsay bled the air out of the cars while I seen the yard master to see if there were bills for all the cars and examined the cards on them. The cars are carded to where they go and that is what we switch by. I found there were bills for all the cars and they were properly carded. We used 12 of them for this train and started to run and switch them in station order. After we got them switched it was customary to couple those cars up so that the road crew taking them east would have nothing to do but couple the engine on, tie up their air brake cars and go on. After they were switched we had all the couplings made but

one, and Mr. Lindsay was to make the coupling. At that time the engine stood just immediately south of 51st street crossing, and Mr. Conroy was about one car from the engine and I was about three. It was dark then and we had lanterns. Mr. Lindsay was probably seven or eight car lengths north of 51st street crossing where this coupling was to be made. The crew that brought the cars from the stock yards hit those cars and the coupling missed. While we were switching them they hit again and the coupling missed. That is
the time Mr. Lindsay went there with the purpose of making
33 that coupling. We got a signal to come ahead north; the
cars struck and the coupling missed. We got a signal to stop. I suppose the signal to stop came from Mr. Lindsay. That was his place and he was there. Of course, it was dark and I answered the signal to stop. We had a signal to stop and we stood still and we got another signal to go ahead.

Mr. SMITH: After that you got a signal to go ahead?

A. Yes, sir.

The signal to go ahead was given after the stop signal was given. I cannot say who gave the signal, but I got the signal to go ahead and I gave it to the engineer.

Q. It was a regular railroad signal of you switchmen to go ahead, was it?

A. Well, it was a signal to go ahead; an up-and-down signal with a lamp.

I repeated the signal to the engineer. It was my business to do that. I repeated it to Conroy, too. Then the engineer went ahead.

Q. And that was the occasion that the plaintiff was injured?

A. Yes, sir.

Q. Now, after this signal was given by the lamp, did you see the lamp after that—the lamp that gave the signal?

A. Well, I don't know, except after we got the signal to go ahead we came ahead and the next thing I knew the man was hurt. After that I gave a stop signal because I knew the cars were not very far apart, and I knew they do not usually handle freight very roughly, that kind of freight, and I did not want them to hit too hard; that is the only reason I can see.

Q. But, after that lamp gave the signal did you see the lamp after that or did it disappear?

A. No, I did not see the lamp then; when I got the signal to go-ahead and looked, I gave the signal to the engineer and looked towards the engine to see if Conroy was taking the signal or whether the engineer was going to take it.

Cross-examination by Mr. MCSHANE:

The body of a car will average about thirty-six feet, and with the bumpers and all about thirty-eight or forty feet. Mr. Lindsay was about eight car lengths north, over three hundred feet, or something
of that kind. We were all working on the same side of the
34 train. I saw this coupler had missed on two prior occasions.
By that I mean it came together but pulled apart and did not couple. At a distance of three hundred feet I could just make out

the lantern but I could not make out the man. I cannot say whether it was the oiler or not, but there was another lamp there and possibly there might have been more. I could not tell looking down that way whether one lamp was a car length this side or the other side of the other light. The come-ahead signal is raise and lower the light up and down, an easy signal to come ahead, raise it and lower it easy a few inches. That was the kind of a signal that I saw the stop signal from the north end and answered it by trans- this signal I turned and transmitted it to the south to Conroy and the engineer, and I paid no further attention to those lanterns to the north. I looked to see that Conroy and the engineer took the signal. Then the train started up to come ahead and I heard the holler very shortly after that. I think I gave the stop signal before he hollered, any how it was pretty close together; at the time the engineer took the slack out of the cars he hollered. Going back to this stop signal, I saw the stop signal from the north end and answered it by transmitting it to Conroy and the engineer. Conroy answered it, too. And then it was after that that I saw this signal which was the come-ahead, upon which I acted and came ahead. Just about the time of the accident was finally pushing them all together, the 12 train at that time because I knew they were not very far apart, and the smoke was blowing down from this engine on to another track so that I was afraid possibly we would hit too hard, and I could not see, and I was going to wait to see what I was doing. I knew, of course, he was up there trying to effect that coupling. I knew the cars had not gone far apart. When the beef cars arrived from the stock yards I had them four loaded cars standing north of 51st street in the westbound track. The beef crew shoved their train north, put the cars over against the south end of these four cars and pushed the whole string until the south end cleared the crossover. Then after their engineer went away my engine coupled on where their engine had been, and I had about 18 cars in the string, about 15 from the beef run and about 4 other loads. I went to the last car that the beef train brought in, the fifteenth car from the engine, cut that off on the south end and left that car standing there, and that was the car that had the defective coupler at the north end; so that with the 14 cars I got from the beef run I pulled south and made some switches in on the side tracks, cutting out the three cars that were not to go east, and made some movements to get them in station order, and then about the time of the accident I was finally pushing them all together, the 12 beef cars, the 4 cars that stood on the track back. And when they were coupled together my work was done, so far as that cut was concerned. The train from the city to which these cars were to be added was already standing at the ice house, was waiting for me. They had ice in the cars and they were waiting for us to get this "fill" out and ready for them. When I got the stop signal in the ordinary run of the business in which the work was done that meant stay there until I got another signal to come or go ahead, and I had what I took to be a come-ahead signal. After the accident I saw the crushed bale of this man's lamp. It was cut in two. When we

got the come ahead signal we moved ahead in the ordinary way. When a signal is given it is supposed to be acted upon at once, and I transmitted it to the engineer and it came ahead at once. So that when the switchman gives his signal to come ahead, when the signal is given to come ahead he knows that in the ordinary course of events they are coming right ahead. Conroy was not over three car lengths south of me. I could see his lamp, and the engineer was on my side of the engine and I was giving and transmitting signals. The engineer has not any right to move until he gets a signal.

Redirect examination by Mr. SMITH:

I don't know just how far apart the cars were at the time Lindsay was hurt. At the time Lindsay was hurt they were just moving ahead slow. After I gave that stop signal it was possibly a minute or two before I got this come ahead signal.

Q. And this "come-ahead" signal came from the place where Lindsay was supposed to be?

A. Well, it come from that point; yes, sir.

Q. And you were standing there at that time, looking for a signal from that place again, weren't you?

A. Yes, sir.

Q. From where Mr. Lindsay was supposed to be?

A. I say, yes, sir.

Very often cars properly equipped with automatic couplers will miss when the coupling is in perfect condition. Sometimes one draw bar will stand a little farther and the knuckle won't
36 enter the proper place, and then both knuckles become closed and neither one of them enter the draw bar. In that case you just simply slack back, pull the draw bar open, open the knuckle and come ahead again.

Recross-examination by Mr. MCSHANE:

What I mean is that because of a curve, one side instead of passing that way, they would sort of pass that way and both close and be outside of each other, and then when I would pull them apart I would open them and pull the bar over again, so that when it is once in the slot it was coupled. With one knuckle open at any place was abundant to couple. At some places on a sharp curve it is necessary to have them both open, that is because they get in an angle and when they are open there is a wider hand for them to pass each other. One knuckle open ought to couple them and it did enter the draw bar but did not couple at this place. These cases that I spoke of where they come together and don't couple is where they do not enter each other but come together. This signal which I said came from the point where Lindsay was, came from the north, up there. It was dark and I could not just exactly tell where it was from.

Redirect examination by Mr. SMITH:

There were other lanterns at the place where this signal came from, there might have been two or three other lanterns from the

place where I received this come ahead signal. I only seen one signal to come-ahead from one lantern.

Recross-examination by Mr. McSHANE:

I saw during this transaction at some time two or more lanterns alongside the train. Whether there were the same number of lanterns in my view all the time I do not remember, because there were cars that I kicked down to this other lead, the yard lead that hid part of the train. I kicked two cars down that yard lead and possibly there might have been more people there, more lamps there, but I did not see them on account of those cars. The space between the yard lead and this track is just the ordinary space between any main track and the side track, that is possibly four or five feet. There were cars there and I was looking down between them.
37 I don't know just exactly where they stood then, but I know they were there. But whether these cars on the lead were as far north or further north or further south I do not remember.

Testimony of Frank Conroy.

FRANK CONROY, testified.

Direct examination by Mr. SMITH:

My name is Frank Conroy. I testified yesterday in this case. I was a switchman for the Grand Trunk on the 21st of September, 1908, I was one of the switching crew of which Lindsay and Daniels were members, and Armstrong was the engineer, I remember this accident to Lindsay. Mr. Lindsay was down at the point where the coupling was to be made, and Daniels was may be five or six car lengths this side of him. I was up near the engine. We were shoving down the first time we tried to make the coupling. Mr Lindsay gave a sign; he kept giving the easy sign to come-ahead and make this coupling. The coupling did not make at that time and he gave a stop signal. After that I could not tell how far the cars shoved apart. I was not down there far enough to tell. Well, I saw Lindsay's lamp go in between the cars and disappear in between the cars. I saw the sign from him, a come-ahead signal like that, from Lindsay's lamp. I repeated the sign to the engineer. I seen him give a sign to come ahead easy. It was after that Lindsay's lamp disappeared between the cars after he gave both signs. He gave a sign to come ahead easy and after that he gave a stop sign and after that he disappeared between the two cars, so that the stop signal was the last signal he gave before he disappeared between the cars. I repeated the come-ahead signal from the hind end to the engineer. We were shoving down these cars. He kept giving an easy sign to come ahead and I done the same thing and then he gave a stop sign and I repeated that to the engineer and that is the last sign I seen him give or seen from the hind end. There was no sign that I seen after that to come ahead with the lantern. I did not see any sign from Daniels or anyone else to the engineer to come ahead

after that. I did not give any sign to the engineer to come ahead. That was the only sign I saw Lindsay give. The last sign was a stop signal. The train was very nearly stopped. It might
38 have moved slowly after that, but at the time we were coupling on, just as the usual case with an "easy." We were coupling on to these cars and shoving down slow and they were very near stopped when he gave the stop signal. There was one attempt to couple the cars when we had hold of them, that is the only one that I refer to and it was at this time that Mr. Lindsay was hurt. After the stop signal was given the train might have drifted a few feet. I could not say whether it stopped instantly. They do not generally stop right on the spot. But when they get a stop signal they stop as soon as they can.

Cross-examination by Mr. McSHANE:

I was giving the easy come-ahead sign, that is the first thing, and my engineer was answering that by moving easily north, and then Lindsay gave a stop sign and that is the last sign that I saw him give.

Testimony of Frederick A. Hanses.

FREDERICK A. HANSES, testified.

Direct examination by Mr. SMITH:

My name is Frederick Hanses. Am car inspector at the present time for the Chicago Joint Car Inspecting and Interchangeable Route. On the 21st of September, 1908, I was car inspector for the Grand Trunk, and I have the original records of the inspection of car SRL 7979 on that day. On the 21st day of September, 1908, I inspected both sides of the car and couplers, link and draw gear of SRL 7979 when it left the stock yards, and the car was O. K. and the coupler was O. K. I found nothing defective with the coupler.

Cross-examination by Mr. McSHANE:

The best recollection I have of this car is from the number in the book. I was inspecting cars all the time, and have probably inspected hundreds of cars, and many be thousands since then. I have no recollection of this car except as noted in my book. It is right here in the book: 7979 SRL; that is the amount of cars
39 I handle, up to sixty cars. Then I have SRL and that 7979, and that is all the book says with reference to this car, and if anything had been wrong with it I would have noted it, made a record of it. It was my duty to make a note of the things I found bad, and I would be to blame if I did not do it. I very seldom overlooked anything in the stock yards. I do not see the man yet that did not miss anything.

Redirect examination by Mr. SMITH:

I did not miss anything on car SRL 7979. When we inspect a car we raise the pin lifter of each to see that the pin lifter or coup-

ling chain is not broken, and of course I usually open the knuckles to make the coupling so that the switchmen would not have to make the couplings when they come in, so *the* they would get out on time, what they call the regular pulling out. I always done it as long as I was there at the stock yards, whether the car was in the middle of the train or on the end, always tried to do it anyway.

Recross-examination by Mr. McSHANE:

In my inspecting of the lifting device I took hold of the lever and raised it so that I saw it was connected with the pin. If the car was coupled together I never raised the pin clear out.

Testimony of Thomas Giblin.

THOMAS GIBLIN, testified.

Direct examination by Mr. SMITH:

My name is Thomas Giblin. At the present time I am car foreman for the Chicago & Alton Railroad. On the 21st of September, 1908, I was car inspector for Swift & Company at what they call the Robey Street Yards. The system of inspection was that there were two inspectors on duty there, and all the cars delivered by any of the different roads into the yards were inspected by them. I was one of the inspectors at that time employed by Swift & Company, and the business of the inspectors was to inspect all of Swift's cars coming into the yard. The cars going out of the yard go through the different houses there for loading, and they usually had repair men scattered among those houses watching for the cars and inspecting and repairing them, and then after that they were delivered to the different lines and their inspector inspected the cars going out. By "their" I mean the line the car was going to, and that system was in effect on the 21st day of September, 1908.

Cross-examination by Mr. McSHANE:

I was not foreman inspector there, but I had main charge of the inspecting. There were two men there and I was one of them.

Testimony of Herman Kramer.

HERMAN KRAMER testified.

Direct examination by Mr. SMITH:

My name is Herman Kramer. I am employed as car inspector for the Grand Trunk, and on the 21st of September, 1908, I was chief car inspector for the same company located at the Elsdon Yards. I have been a car inspector for nineteen years for different companies and have been in the car works for twenty-four years.

Have been employed by the old Chicago & Calumet Terminal, Swift & Company, C. & E. I. and the Grand Trunk. On September 21, 1908, about seven o'clock, I was called from my home to go out to inspect a car that a man got injured on. I came out to the yard and found SRL 7979 standing on track 18 north of 51st street. On the way going there I asked the man that came after me what was the matter with the car. He said: "I do not know; I think it is a defective lock." I went over and examined the car. I got hold of the lifter and I seen it was stuck and I gave it a jerk and the lock came up. I mean the pin lifter. I then got hold of the knuckle and closed it and repeated that with the lever, and worked it two or three times. While in there somebody stood behind me and says "I think that is a defective lock." And then I called one of the oilers to go and get another lock, that I would remove this one I was holding. Then I was called over. While he was going to get the lock I was called over to inspect NJD Car 14128, which was on the eastbound main just at 51st street. I examined the knuckle
41 and lock, pin lifter and everything and found everything O. K. I then told the man in charge that that car is O. K. and you are ready to go ahead. Then I went back and put in the lock in this 7979, and took the lock that was claimed to be defective and turned it over to the car foreman. When I first examined the knuckle it was closed and locked. And first I got hold of the pin lifter and it seemed as though it did not want to come and I gave it a jerk and it come up. It was a tower coupler. The model now shown me is the tower. I can illustrate — the jury from the model how that coupler was operated. The coupler is in this condition (indicating) and there is a pin lifter rod attached to this chain and the rod turns or runs back about a foot, and then runs to the side of the car on here, and the end hangs down some twelve inches, some eighteen inches long, which would act as a lifter. By getting hold of this lifter it acts on this coupler pin and throws this knuckle open. When you let it go it stands in this position. You will find that the pine here is not out of position, but it locks that one here, drops down in there and makes a solid lock as the lock engages both sides of the knuckle. It will not drop when the knuckle is open because it sets on the bottom inside. When I first examined it it was closed and locked, and when I manipulated it it worked freely after I repeated it. I removed this lock, that is this part of it, from the car and turned it over to the car foreman.

Cross-examination by Mr. McSHANE:

I gave it a jerk in order to bring it up. When I first tried, it, it did not come. Then I gave it a hard jerk. The jerk was not with both hands, only one hand. I don't know that I am a pretty strong man; that is about waist high. Then I went over and took hold of the lever and after I did get it open I kept working with it and some man behind me said: "That is a defective lock." And I sent for another lock. I was chief car inspector then and had two inspectors at night and two in the day. I would help inspect when they would be rushed with work. I am still chief car inspector there.

Redirect examination by Mr. SMITH:

If, when a coupling is to be made, if both the automatic couplers are closed, the coupling will not make. One of them has got
42 to be open in order to enter into the other. If one is open and the other closed, and the closed coupler strikes the open coupler a coupling is made. If a closed coupler strikes an open coupler a coupling would not be made when on a curve or when the couplers are not centralized, that is, are not in the center of the car; and then such a thing as that might occur, that the knuckle might hit the guard arm and not make.

Recross-examination by Mr. McSHANE:

If two cars are brought together and both knuckles are open and the locks come together and the knuckles pass and one becomes fastened and locks, if the other does not lock they pull apart. In a tower coupler if one is locked and the other open and they go in there and close, and yet if the pin does not drop, it will not pull apart again. It can't go in. But if it does go in and does not lock it pulls apart.

Testimony of Frank Brick.

FRANK BRICK testified.

Direct examination by Mr. SMITH:

My name is Frank Brick. I testified yesterday. I was one of the oilers employed by the defendant on the night of the accident. I was on the same side of the track that Mr. Lindsay was on. I did not see anybody but Mr. Lindsay and me. I did not give any signal to the engineer to come ahead. I had nothing to do with signals. There was nobody working with me on that side. I was the only one. I saw Lindsay signal to go ahead the first time and after that he gave no signal that I see.

Redirect examination by Mr. SMITH:

At the time they claim Lindsay gave a signal to come ahead he gave a stop signal. After that I was packing boxes, that is I was not looking at Mr. Lindsay.

Recross-examination by Mr. McSHANE:

In that work of packing boxes I had my lantern and I was up and down, and my lantern would be all around there.

43 Redirect examination by Mr. SMITH:

And when I was working I was not working with my lantern up and down; I was working down and held the lantern about a foot from the ground, and the switchman hold it about two feet from the ground, that is, just a little higher.

Recross-examination by Mr. McSHANE:

I would straighten up after working with one box and come to the next one and then would raise my lantern and go to the other box and also take my lantern and look into to see if it needed anything. I kept a lookout to determine for myself whether the train was going to start up at any time. I did not go from the tracks like the switchmen. I just stayed with the cars.

Redirect examination by Mr. SMITH:

When Mr. Lindsay was hurt I was about a car or a car and a half from him, packing boxes, that is I was down on the ground, just holding the lantern in the left hand and I open- the box with the right. I did not lift the lantern up because I held it in the left hand; and this lantern was about a foot from the car, right by the box.

Affidavit as to Testimony of John Armstrong.

Affidavit as to testimony of John Armstrong, the engineer; and it was admitted by plaintiff that if said Armstrong were present he would testify:

"That, during the evening of September 21, 1908, he was at work as such engineer in charge of Grand Trunk switch engine Number 1280 and working in the same crew with the plaintiff in the yards of the defendant at Chicago, Illinois. That, the crew consisted of the foreman A. H. Daniels, switchman, Frank Conroy and plaintiff, fireman F. Lang and himself; that about 6:40 p. m. on that day he, as such engineer, was shoving twelve cars down on the west-bound main track north, to couple onto three cars which were standing about twelve car lengths North of the Fifty-first street crossing; that plaintiff at said time was standing at the South end of these three cars; switchman Conroy was standing at the beam of the loco-
44 motive engine, on the east side thereof; Foreman, Daniels was standing three car lengths north of Conroy, that the foremost of the twelve cars so being shoved by him, as such engineer, was N Y D car #14128; that the car to which the coupling was to be made was S R L #7979, the same being foreign cars which came into the possession of the defendant from other railroads, in the usual course of its business as a common carrier; that each of said cars was equipped with Tower Automatic couplers so that they coupled automatically by impact without the necessity of a man going between the ends of the cars for that purpose; that he, as such engineer, shoving the said twelve cars, so that said cars N Y D car #14128 and S R L car #7979 came together; that he shoved said cars together in response to a signal which plaintiff gave to him as such engineer, to shove ahead; and, that the cars did not couple at that time, which is frequently the case even when automatic couplers are in perfect condition; that, thereupon, plaintiff gave Conroy a signal to pull ahead, and Conroy repeated said signal to him, 'pull ahead' so that said cars were separated about the space of one car-

length; that at said time, plaintiff was at a point near where said coupling was to be made; that thereupon plaintiff gave a signal to Conroy to come ahead, and Conroy repeated it to him, as such engineer, and in obedience to such signals he began shoving said cars together; that he had no knowledge at the time of shoving the cars together said second time, that plaintiff was or would go between them, or that he would place himself in a position of danger in respect thereto; that at the time the said cars came together, the said second time, the cars which he was shoving as such engineer, were barely moving, and Daniels gave him a 'stop' signal, and he immediately stopped the engine and cars; that the plaintiff at or prior thereto did not give him or any other member of the crew any 'stop' signal, or other signal to notify him that the plaintiff was between the cars, or intended going between the cars, or, would place himself in a position of danger; that it was and is the custom in the Yards, and the rule of the defendant company, that before adjusting an automatic or other coupler upon a car to which a cou-ling is to be made for the switchman not to give the engineer a 'come ahead' signal, but if any signal is to be given to the engineer, a 'stop' signal is to be given."

Thereupon the defendant rested its case.

The foregoing was all the evidence offered or received on the trial of said cause. At the close of the evidence the defendant
45 moved the court to instruct the jury to find a verdict for defendant, but the court refused to so instruct the jury.

To which ruling of the court the defendant, by its counsel then and there excepted.

Request for Instructions to Jury.

Mr. McSHANE: I hand to the gentleman on the other side, your honor, three Special Interrogatories as our statute requires before argument (interrogatories than handed to defendant's attorney).

Mr. SMITH: We object to them. The rule of the Federal Court is that the Interrogatories must cover the whole case.

Mr. McSHANE: There are the Special Interrogatories, and there are two sets.

Mr. SMITH: I object.

The COURT: If the court ask the jury to answer those, the record will be made up. Any exception on the point will be saved.

And thereupon the defendant, by its counsel, requested the court to give to the jury the following instructions, Numbers 1, 2, 3, 4, 5, 6, 7, 8 and 9 as follows:

1. We ask the court to instruct the jury that the statute compelled the defendant to refuse to haul on its line cars not equipped with couplers which would couple automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars.

But this obligation of the carrier is not increased by compelling it to see at all times and places that the couplers are in good order.

Therefore, if the defendant has exercised a high degree of care in that respect it has performed the duty which the statute has placed upon it.

2. The Court instructs the jury that if you believe from the evidence that plaintiff gave a "come-ahead" signal to the switchman and engineer, and then went between the cars and in consequence thereof was injured, then the giving of the "come-ahead" signal by plaintiff was the proximate cause of the injury, the defect in the coupling being a remote cause, and plaintiff is not entitled to recover.

3. The court instructs the jury that if the defendant maintained a safe system of inspection and employed a competent inspector, and he inspected the automatic coupling apparatus on the car in question and found no defect therein, then the defendant has performed its duty to plaintiff and cannot be held liable for his injury.

4. If you believe from the evidence that there was a lever
46 on the side of the car which was moved against the car to which the coupling was to—made, and by the knuckle of that car was closed but could have been opened by means of that lever by plaintiff, but he failed to do so and went between the cars and attempted to adjust the coupler, then he was guilty of contributory negligence.

5. The Court instructs the jury that the testimony of defendant's car inspector, Hanses, that he did inspect the car in question and did not discover any defect in the couplers that his testimony should be given the same consideration, other things being equal between the witness, as positive testimony.

6. The Court instructs the jury that negligence on the part of defendant cannot be inferred from the mere fact that the pin would not lift. Before plaintiff is entitled to recover there must be some substantial proof of the negligence alleged in the declaration. The negligence of defendant cannot be inferred. The fact that plaintiff has named a certain sum in his declaration as his damage is no evidence that he is entitled to recover that or any other sum.

7. The Court instructs the jury that where there is a safe and dangerous way of doing an act, and the servant chooses the dangerous way, then he is guilty of contributory negligence.

8. The jury are instructed that if you believe from the evidence that there was a lever on the opposite side of the car plaintiff was on, with which plaintiff could have opened the knuckle of the automatic coupler so that it would couple automatically by impact, without the necessity of his going between the cars for that purpose, and he failed to use that lever, then he was guilty of negligence.

9. The jury are instructed that if you believe from the evidence that the plaintiff was guilty of negligence which contributed to his injury then he cannot recover.

But the court refused to give said instructions to the jury except in so far as they are included in the court's charge as hereinafter set forth but modified instruction Number 2 and gave the same as modi-

fied to the jury, which said modification of said instruction appears in the charge of the court to the jury which follows:

To which ruling of the court in refusing to give said instructions and each of them to the jury, the defendant then and there excepted, and to which ruling of the court in modifying said instruction Number 2 and giving the same as modified to the jury, the de-
47 fendant by its counsel, then and there excepted.

And thereupon the court instructed the jury in this cause as follows:

Instructions to Jury.

Filed Apr. 24, 1911.

The COURT:

GENTLEMEN OF THE JURY: The determination of this case depends largely upon a question of fact, and the law as applied to that fact will be given to you by the court. You must realize, and I so instruct you, that yours and yours alone is the right, power and duty to determine from the evidence what the real facts are; this I wish you to understand clearly, and, no matter what I may say in the course of these instructions, about the facts or the witnesses, no word of mine is permitted to influence you one way or the other in determining any material fact. If I make any reference to the evidence, remember, please, that it is for the sole purpose of enabling you to exercise your best judgment in reaching a conclusion. You will, therefore, decide how the accident happened in this case and what the situation of the parties was at the time, and, I will tell you how the law must be applied.

In arriving at your conclusion upon the facts, you are instructed that the burden of proof rests primarily upon the plaintiff to prove his case by a preponderance or greater weight of the evidence, and this burden rests upon him throughout the whole trial.

The greater weight or preponderance of the evidence does not depend necessarily upon the number of witnesses who have testified to the existence or non-existence of a given fact. You are the sole judges of the credibility of the witnesses and of the weight that should be given to their evidence. You may take into consideration, if you please, their interest, if any, in the outcome of the suit, their relation, if any, to the parties to this cause, their demeanor while testifying, their frankness and candor while on the witness-stand, or the contrary, as you may find the case to be, the fact, if it is a fact, that they have been contradicted or corroborated by other credible evidence or circumstances in evidence, and all things considered, you are to determine where the preponderance or greater weight of the evidence rests.

If you believe from the evidence that any witness has intentionally or knowingly sworn falsely as to any material fact or circumstances, you are at liberty to disregard altogether the evidence of such witness, except in so far as he may be corroborated by other credible evidence, or circumstances in evidence.

48 You are also instructed that the plaintiff has a perfect right to testify in his own behalf, and you have no right, either to disregard or to give unusual weight to his testimony, merely because he is the plaintiff. His credibility is to be tested by and subjected to the same tests as are legally applied to any other witness, and, in determining the degree of credibility that should be accorded to his testimony, you have the right to take into consideration the fact that he is interested in the result of the suit; likewise, you have no right to disregard the testimony of any witness sworn on behalf of the defendant simply because such witness is or was an employé of the defendant.

You are also instructed that this case should be considered by you as if between two persons of equal standing in the community. The fact that one of the parties is a corporation should not in any way affect your minds, and the rights of each party should and must be determined upon the evidence introduced in this case and the instructions given to you by the court.

You are not permitted to indulge in any feeling or prejudice against the defendant, because it is a corporation, and, you are not permitted to entertain for the plaintiff any sympathy merely because he was injured and the defendant is a corporation. It is your duty to hear and to consider the evidence with the same fairness and impartiality as you would if the suit were between two individuals in the same condition of life.

While, as a matter of law, the burden of proof is upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still if you find that the evidence preponderates in favor of the plaintiff, although but slightly, it will be sufficient for you to find the issues for the plaintiff. On the other hand, if you are unable to determine which way the evidence preponderates upon any material fact, that is to say, if you find it equally balanced or if you find it preponderates, although but slightly, in favor of the defendant, then it is your duty to return a verdict in favor of the defendant.

A servant ordinarily assumes all of the dangers, risks and hazards which are incident to the service which he undertakes to perform, and he is presumed to have entered upon his contract of employment with reference to those dangers, risks and hazards, where the employment is dangerous; he also assumes the risk which he may incur from manifest perils; he assumes the risks and
49 dangers of devices and methods of work which are open and apparent and equally well-known to the servant as to the master. These are general rules governing the relation of master and servant.

The assumption of risk on the part of employés of railroad companies which are common carriers engaged in interstate commerce, has been modified by an Act of Congress known as the Safety Appliance Act, which was in operation at the time of the accident in question in this case. This Act provides, Section 2, that on and after the first day of January, 1898, it shall be unlawful for any common carrier to haul or permit to be hauled or used on its lines

any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. And, Section 8 provides that any employé of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of said carrier after the unlawful use of such locomotive, car or train has been brought to his knowledge.

In this case it is claimed by the plaintiff that at the time of the accident he was engaged in moving interstate commerce for the defendant company with a car not equipped properly according to the statute; that, although the car was provided with automatic couplers, those couplers were out of order so that they did not, in fact, couple automatically. When the statute provided for couplers which coupled and uncoupled without the necessity of men going between the ends of the cars, it meant, in my opinion, just what it said, and, it is no compliance with the statute to have the car equipped with an automatic coupler of some sort which does not couple automatically by impact and which cannot be coupled without the necessity of men going between the cars.

To sustain the contention of the plaintiff it is necessary for him to show, by a preponderance of evidence, first, that at the time of the accident he was working on a car that was engaged in moving interstate traffic; and, second, that at the time of the accident the cars then in use were not equipped with automatic couplers as required by the Act of Congress. In addition to that, the second count of the Declaration charges negligence on the part of the defendant in failing to furnish the plaintiff with a reasonably safe place to work and reasonable equipment and tools to work
50 with; and that, by the negligence of the other employés of the railroad he was injured. Those facts must be proved by him before he may recover, by a preponderance of the evidence.

If the car upon which the plaintiff was working and upon which he claims the coupler was defective was being moved from a point within this state to some point out of the State with freight to be there delivered, it would be moving interstate commerce as provided by the Act of Congress.

If you find from the facts in this case that the car was so engaged in moving interstate commerce, you must be further satisfied from the evidence that it was not equipped with automatic couplers as provided by law, before the plaintiff may recover. If you find from the evidence that at the time of the accident the car in question was so equipped that it was necessary for men to go between the ends of that car and another car to couple or uncouple them, then such coupling did not comply with the Act of Congress and its use was unlawful. If, at the time of the accident the defendant was using such a coupler as was prohibited by the Act of Congress it was guilty of negligence, by that very fact; and, if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. Manifestly, the law contemplates that

the cars shall be so equipped that the couplings shall actually be made automatically, and if not so equipped the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the defendant company after such unlawful use of the cars had come to his knowledge; if, however, by his manner of using such unlawful coupling the plaintiff contributed to the accident by his own carelessness, he cannot recover, notwithstanding the fact that the coupling was unlawful; in such case he must take the consequences of his own contributory negligence.

It is no defense to show that the defendant has used diligence or care of any degree to keep the cars in a reasonably safe condition; the statute commands a duty; the defendant must perform the duty, and it moves the cars in a defective condition at its peril.

Knowledge is not an element of an offence under the Safety Appliance Act and a failure to include knowledge as such an element of the offense must have been present in the mind of the enacting body and its omission was unquestionably in their minds; in order that this statute might induce such a high degree
51 of care and diligence on the part of the railroad companies as to necessitate and change the manner of inspecting appliances, and to protect the lives and safety of employés from danger due to a defective appliance, such as is designated in this Act. The Act was not intended to increase the difficulty of getting compensation for injuries sustained, but to decrease the number of cases in which injuries would happen; it abolishes in terms "assumption of risks," and where there exists a practical necessity to couple the cars what is done is an assumption of risk. In this case if you believe from a preponderance of evidence that a situation confronted this plaintiff which required him as a switchman to cope with the situation and to couple the cars in question and he was justified in so doing, in attempting to couple the cars, then so far he is not charged with what the law says is assumption of risk. If after he started to go between the cars he has done something which was carelessly done or which you can say from a preponderance of the evidence contributed approximately to the accident, then he cannot recover. The putting of his arm between the cars under such circumstances, and traveling with them,—he testified that the cars were moving when he went between the cars, and that they stopped shortly afterwards; the putting of his arm between the cars under those circumstances is not of itself contributory negligence. If there be contributory negligence at all, it depends not upon his assuming the risk under the circumstances in evidence in this case but upon the care with which he acted while in the performance of the work which he assumed.

You are further instructed that if you believe from the preponderance of the evidence, that the plaintiff gave a "come-ahead" signal to the switchman or engineer,—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the "come-ahead" signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that under the cir-

cumstances the "come-ahead" signal was the proximate cause of the injury, then your verdict must be for the defendant.

You are also instructed that where there is a safe and a dangerous way of doing an Act, and the servant uses a dangerous way and is injured thereby, he is charged with negligence on his part and may not recover.

I wish to caution you against permitting the character of
52 the plaintiff's injuries influencing you at all in arriving at a conclusion upon the question of whether or not the defendant is liable or responsible for the accident. You have nothing whatever to do with the character of the plaintiff's injuries until it is first determined from a preponderance of the evidence that the plaintiff is entitled to recover; then and then only you are permitted to consider the extent of his injuries; and, in determining the amount of injuries the plaintiff is entitled to recover, if any, it is not necessary that any witness should have expressed an opinion as to what the amount to be awarded to the plaintiff is; but you may make such estimate from the facts and circumstances in proof, and by considering them in connection with your knowledge, observation and experience in the affairs of life. In this connection you have a right and should take into consideration all the facts and circumstances proved by the evidence, the nature and extent of the plaintiff's physical injuries, if any, so far as they are shown by the evidence to be the direct result of the injury; his suffering in mind and body, if any, resulting from said physical injuries; and, such future suffering and loss of health, if any, as you may believe from the evidence before you in this case the plaintiff has sustained or will sustain by reason of such physical injuries; and, you will determine from the evidence under all the circumstances what will be a fair compensation for the injury which the plaintiff has sustained, or will sustain, if any, so far as such damages, and injuries, if any, are claimed and alleged in the declaration and are proven.

I will ask you, gentlemen, to make three special findings: The first is, "Do you find from the evidence that the defendant was guilty of a violation of the Safety Appliance Act as charged in the first Count of the Declaration?" This you will answer Yes or No. The second is, "If you find that the defendant was guilty of a violation of the Safety Appliance Act, as charged do you find from the evidence that such violation was a proximate or concurring cause of the plaintiff's injury?" This you will answer Yes or No. The third question is "Considering all the evidence, including the plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care for his own safety?" Answer Yes or No.

And by ordinary care in a case of this kind is meant such
53 care as the average man situated as the plaintiff was with the surrounding circumstances, would have exercised for his own safety.

I will give you two forms of verdict, Gentlemen: If you find the issues for the plaintiff, you will sign the verdict which reads, "We,

the jury, find the issues for the plaintiff, and assess his damages at the sum of — Dollars"—filling in such sum as, in your opinion, is justified, in the blank. If you find for the defendant, you will sign the form which reads, "We, the Jury, find the defendant not guilty." You will be good enough to retire.

Mr. McSHANE: If the court please, just a moment; I ask the court,—I think it is probably already done in a way—I ask the Court that in answering that Finding as to whether the plaintiff was or was not in the exercise of ordinary care, that the jury be instructed they have a right, and it is their duty to consider all the evidence, and his conduct in all, both before and after going between the cars.

The COURT: I think I read the language as presented, Mr. McShane.

Mr. McSHANE: Yes, you did and I just wanted to emphasize, this that the Court tells the jury they are not confined alone to his conduct while between the cars in any way in finding that question.

The COURT: I added the little explanation of ordinary care for that very reason that they may place themselves, as you have, in the position of the plaintiff and say whether under all the surrounding circumstances the average man was justified in acting as he acted, consistently with his own safety. It would seem to me that covered the point.

Mr. SMITH: If the court please, we except to the court requiring the jury to answer the three special interrogatories on the ground the interrogatories do not cover the whole case, and is accompanied by a general verdict.

The COURT: Let the record show that.

Mr. SMITH: And, we except to the charge of the Court that gives a construction defined by your Honor to the Safety Appliance Act.

The COURT: Which particular phase of it?

Mr. SMITH: Well, I do not remember now.

The COURT: Well, if you cannot tell me wherein I am mistaken in the construction of the law, I cannot correct it.

Mr. SMITH: I except to the charge of the court which
54 states under the second count of the Declaration that it was a duty and obligation of the defendant to furnish the plaintiff a safe place to work and reasonably safe appliances, and that is the ground of liability.

Mr. McSHANE: I think the court is in error about that.

The COURT: Yes, I at the time thought that was not the charge of the Second Count. Have you the declaration there?

Mr. McSHANE: I have a copy of it here. The Court has it.

The COURT: Gentlemen of the jury: The second Count of the declaration charges common law negligence in starting the train at a time when the plaintiff was in such a position that it would be dangerous for the train to be started; that the defendant, through its servants, knew the position that plaintiff was placed in and the plaintiff had a right to rely upon things resting just as they were until some further action on his part authorized or notified the engineer of the train to proceed. Now, if you find from all the

circumstances in the case that the plaintiff was in the exercise of due care for his own safety and that the accident was caused not by any action on the part of the plaintiff but by the negligence and carelessness on the part of the defendant through its other servants, the plaintiff is entitled to recover in this case.

Mr. McSHANE: Under the Count your Honor.

The COURT: Under the second Count.

Mr. SMITH: Now, we except to the charge of the Court which states that the reasonable care on the part of the defendant in providing and maintaining the automatic coupler is no defense here.

The COURT: Very well.

Mr. SMITH: We except to the charge of the Court which states that the putting by the plaintiff of his arm between the couplers of the car while they were in motion, as not constituting contributory negligence, is not applicable here.

Mr. McSHANE: I think, if the court please, that the Court was a little mistaken. I do not think the evidence shows the cars were in motion when he went between them.

The COURT: Well, I do not think it makes any difference.

Mr. McSHANE: No, I don't .

The COURT: I think that the plaintiff testified that as he stepped between the cars the cars were still in motion.

55 Mr. McSHANE: No, when he gave the signal.

The COURT: They stopped. He gave them the signal.

Mr. McSHANE: Well, he said they were in motion when he gave them the signal, your honor, but they were not in motion when he went between.

The COURT: Very well, gentlemen: The evidence shows that the cars had stopped; at least, the plaintiff claims that the evidence shows that the cars had stopped before he went between the cars.

Mr. McSHANE: So that what the Court said about putting his arm between the cars while in motion, is out, is it?

The COURT: Yes.

Mr. SMITH: And we ask the Court to instruct the jury if they believe from the evidence that the defendant maintained a safe and sufficient system of inspection and employed competent inspectors and they inspected the automatic coupler——

The COURT: You have presented your instructions.

Mr. SMITH: Yes, but I did not think they and the modifications made by the Court would be saved otherwise.

The COURT: Yes, they will be saved.

Mr. McSHANE: I did not understand that could be done.

The COURT: The defendant in this case has made some requests of the court in writing for charges to the jury, and if I refuse to make those charges they are preserved as a matter of record, and will be.

Mr. SMITH: Yes.

Mr. McSHANE: And the same is true on our side?

Mr. SMITH: I only ask one thing: For the Court to instruct the jury that the fact that the plaintiff claims a certain sum in his

declaration as damages is not any evidence that he is entitled to recover that sum or anything else.

The COURT: I will instruct the jury to that effect: It is true that a plaintiff in preparing his declaration for a cause of action is obliged to set some sum, which is the outside limit of his recovery. The mere fact that he states in his declaration that he claims a certain amount of money as compensation for his injury is not in any sense evidence of what he is entitled to recover; all it means is that he is entitled to nothing, unless under the evidence as found by the jury and the instructions of the court as given to the *court*, the jury finds he is entitled to something.

Mr. MCSHANE: I just want to except to the charge that contributory negligence is a defence.

56 The COURT: I will preserve the record of that. I have got your requests here, which includes that.

Mr. MCSHANE: All right. That is all right.

The COURT: Gentlemen, you will retire now with the Marshal.

The foregoing were all the instructions given by the court to the jury upon the trial of said cause.

Thereupon the jury retired and afterwards, and on the 10th day of January, 1911, returned into open court their written verdict in said cause, finding the defendant guilty and assessing the plaintiff's damages at the sum of $13,000, and also at said time returned into court their written answers to the interrogatories so propounded to the jury by the court, upon the request of plaintiff as aforesaid, said interrogatories being each and all answered in the affirmative by the jury.

And thereupon the defendant moved the court to grant a new trial of this cause.

And afterwards, on the 1st day of March, 1911, said Circuit Court overruled and denied said motion for a new trial and rendered final judgment on the verdict in favor of plaintiff and against defendant for the sum of $13,000 and costs.

To all of which the defendant excepted at the time in open court. And at said time said court also entered of record an order allowing said defendant sixty days from said date in which to present and file its bill of exceptions in said cause, and fixed the amount of said bond for writ of error in the sum of $15,000.

And forasmuch as the matters and things above set forth do not fully appear of record, the said defendant tenders this its bill of exceptions and prays that the same may be signed and sealed and made a part of the record in this cause, according to law in such case, which is accordingly done and ordered by the court on the 24th day of April, 1911.

GEO. A. CARPENTER, *Judge*. [SEAL.]

O. K.
JAS. C. MCSHANE,
Att'y for Pl't'ff.

(Endorsed:) Filed April 24, 1911, John H. R. Jamar, Clerk.

57 And on to-wit: the twenty-fourth day of April, 1911, come the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Petition for a Writ of Error in words and figures following to-wit:

Petition for Writ of Error.

Filed Apr. 24, 1911.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Gen. No. 29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Defendant's Petition for Writ of Error.

To the Honorable George W. Carpenter, Presiding Judge of said Court:

Your petitioner, Grand Trunk Western Railway Company, respectfully states and shows:

That on the 1st day of March, 1911, at the regular December Term, 1910, of said court of the United States, for the Northern District of Illinois, Eastern Division thereof, a final judgment was rendered in said court against your petitioner and in favor of said George Lindsay in a certain suit pending in said court, wherein said George Lindsay was plaintiff and your petitioner was defendant, which said judgment was for the sum of $13,000 damages and costs of suit.

That in the rendition of said judgment, and in the record and proceedings at said trial, manifest error has intervened, as your petitioner is advised, to its great damage, as more fully appears by its written assignment of errors, which is presented and filed herewith. And your petitioner also presents and files herewith its supersedeas bond in said cause in the sum of $15,000, with good and sufficient surety, conditioned as required by law in such case.

Wherefore, your petitioner prays that a writ of error may be granted in said cause to the Circuit Court of Appeals for the Seventh Judicial Circuit, as by law provided; that said bond be approved and made a supersedeas in said cause until said errors shall
58 have been presented to and determined in said Circuit Court of Appeals; that the record in said cause be ordered to be certified to said Circuit Court of Appeals, as by law provided, to the end that the errors complained of, if any such have occurred, may be duly corrected and full and speedy justice done in the premises.

GRAND TRUNK WESTERN
RAILWAY COMPANY,
By KRETZINGER, ROONEY &
KRETZINGER,
Its Attorneys.

(Endorsed:) Filed April 24, 1911, John H. R. Jamar, Clerk.

And on the same day to-wit, the twenty-fourth day of April, 1911, come the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Assignment of Errors, in words and figures following to-wit:

Assignment of Errors.

Filed Apr. 24, 1911.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Assignment of Errors.

And now comes the defendant, Grand Trunk Western Railway Company, and says that there is manifest error on the face of the record in this, to-wit:

1. The court erred in refusing to instruct the jury, upon defendant's request, at the close of all the evidence to return a verdict finding the defendant not guilty.

2. The court erred in refusing to give to the jury the second instruction by defendant, as follows:

"The court instructs the jury that if you believe from the evidence that plaintiff gave a 'come ahead' signal to the switchman and engineer, and then went between the cars and in consequence thereof was injured, then the giving of the come ahead signal by
59 plaintiff was the proximate cause of the injury, the defect in the coupling being a remote cause and plaintiff is not entitled to recover."

And modifying the same as follows:

"You are further instructed that if you believe from the preponderance of the evidence, that the plaintiff gave a 'come ahead' signal to the switchman or engineer,—one or both,—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that under the circumstances the 'come ahead' signal was the proximate cause of the injury, then your verdict must be for the defendant."

And in giving the same as modified to the jury.

3. The court erred in refusing to give to the jury each and every instruction requested by defendant and refused by the court.

4. The court erred in refusing to instruct the jury, upon defend-

ant's request, that the obligation of defendant to refuse to haul foreign cars not properly equipped with automatic coupler was not increased by compelling it at all times and places to see that the couplers were in good order.

5. The court erred in refusing to instruct the jury, upon defendant's request, that if the defendant maintained a safe system of inspection and employed a competent inspector and he inspected the coupler on that car in question and found no defect therein, defendant cannot be held liable.

6. The court erred in refusing to instruct the jury, upon defendant's request, that the testimony of defendant's car inspector, that he did inspect the car in question and found no defect in the couplers, should be given the same consideration, other things being equal between the witnesses, as positive testimony.

7. The court erred in refusing to give to the jury the following instruction, requested by defendant:

"The jury are instructed that if you believe from the evidence that plaintiff was guilty of negligence, which contributed to his injury, then he cannot recover."

8. The court erred in instructing the jury that reasonable care on the part of defendant in providing and maintaining the automatic coupler is no defense.

9. The court erred in requiring the jury to make certain special findings requested by plaintiff, because such special findings did not cover all the issues in the case.

60 10. The court erred in the following ruling on evidence. In admitting the testimony of the witness, Miller, called by plaintiff and interrogated by plaintiff's counsel, as follows:

"Q. In the ordinary working of these couplers, when they are in ordinary repair, can a man shove them in with his heel as well as his hand?"

The question was objected to on the ground that the witness was not qualified, and that it called for a conclusion. The witness answered "Yes" and the court overruled defendant's motion to strike out the answer, and defendant excepted.

11. The Safety Appliance Act and the Federal Employer's Liability Act, upon which plaintiff's alleged cause of action is founded, is contrary to the constitution of the United States.

12. The declaration of plaintiff fails to state a cause of action against defendant.

13. The damages are excessive and unwarranted by the evidence.

14. The verdict and judgment are contrary to the law and evidence.

Wherefore, said defendant prays that the judgment aforesaid be reversed by reason of the foregoing error, and that it may be restored to all things which it has lost by reason of said judgment.

KRETZINGER, ROONEY &
KRETZINGER,
Attorneys for Grand Trunk
Western Railway Company.

(Endorsed:) Filed April 24, 1911, John H. R. Jamar, Clerk.

And on the same day to-wit: the twenty-fourth day of April, 1911, being one of the days of the regular December, 1910, Term of said Court, in the record of proceedings thereof, in said entitled cause before the Hon. George A. Carpenter, District Judge, appears the following entry to-wit.

61 *Order of Apr.* 24, 1911.

29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

Pursuant to the prayer of the foregoing petition, a writ of error is allowed in said cause to the United States Circuit Court of Appeals within and for the Seventh Circuit, and a superseedas is also allowed as therein prayed, on the 24th day of April, 1911.

And on the same day to-wit the twenty-fourth day of April, 1911, come the Grand Trunk Western Railway Company, as principal and National Surety Company as surety and filed in the clerk's office of said Court a certain Bond in word and figures following to-wit:

Bond.

Filed Apr. 24, 1911.

Know All Men By These Presents, That we, Grand Trunk Western Railway Company, a corporation, as principal, and National Surety Company, as sureties, are held and firmly bound unto George Lindsay, in the full and just sum of Fifteen Thousand ($15,000) Dollars, to be paid to the said George Lindsay, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this First day of April in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division thereof, in a suit pending in said Court, between George Lindsay, plaintiff, and Grand Trunk Western Railway Company, defendant a judgment was rendered against the said Grand Trunk Western Railway Company, and the said Grand Trunk Western Railway Company, having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George Lindsay, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be
62 holden at Chicago within thirty days from the date hereof.

Now, The Condition Of The Above Obligation Is Such,

That if the said Grand Trunk Western Railway Company, shall prosecute its writ to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

GRAND TRUNK WESTERN RAILWAY COMPANY,
By JOHN J. ROONEY,
Its Attorney in Fact. [SEAL.]
NATIONAL SURETY COMPANY,
By E. A. ST. JOHN,
Resident Vice President. [SEAL.]
P. J. LORANGER,
Resident Assistant Secretary. [SEAL.]

Sealed and delivered in presence of—

——— ———,
——— ———.
——— ———.

Approved by—
CARPENTER, *Judge.*

24 April, 1911.

O. K.
JAS. C. McSHANE,
Att'y for Pl'tff.

(Endorsed:) Filed April 24, 1911, John H. R. Jamar, Clerk.

Writ of Error.

Filed Apr. 24, 1911.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between George Lindsay, Plaintiff and Grand Trunk Western Railway Company, Defendant, manifest error hath happened, to the great damage of the said Grand Trunk Western
63 Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and pro-

ceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of April, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] JOHN H. R. JAMAR,
Clerk of the Circuit Court of the United States for the Northern Dis't of Illinois.

Allowed by
GEORGE A. CARPENTER, *Judge.*

Return to Writ.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 16th day of May A. D. 1911.

[SEAL.] JORN H. R. JAMAR,
Clerk United States Circuit Court, Northern District of Illinois.

Endorsed: 29379. United States Circuit Court of Appeals Seventh Circuit. Grand Trunk Western Railway Company plaintiff in Error, vs. George Lindsay Defendant in Error. Writ of Error. Filed April 24, 1911. John H. R. Jamar, Clerk.

64 Filed Apr. 24, 1911.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29397.

GEORGE LINDSAY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY.

To the clerk of the above entitled court:

Please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals

for the Seventh Judicial Circuit, under the writ of error heretofore allowed by said court, and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Transcript of record from the Superior Court of Cook County.
Plea,
Order of 9th of January, 1911, called for trial and jury sworn,
Order of 10th of January, 1911,
Judgment of March 1, 1911,
Order of March 2, 1911,
Bill of Exceptions,
Petition for writ of error,
Assignment of errors,
Order allowing writ of error,
Bond on writ of error.

Said transcript to be prepared as required by law, and the rules of this court and the rules of the United States Circuit Court of Appeals, for the Seventh Circuit and on file in the office of the Clerk of the said Circuit Court of Appeals at Chicago, before May —, 1911.

KRETZINGER, ROONEY & KRETZINGER,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed April 24, 1911, John H. R. Jamar, Clerk.

65 *Certificate of Clerk.*

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the proceedings had of record in said Court, made in accordance with Præcipe filed in the cause entitled George Lindsay vs. Grand Trunk Western Railway Company, as the same appear from the original Records and Files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this 16th Day of May, 1911.

[SEAL.] JOHN H. R. JAMAR, *Clerk.*

66 Filed May 1, 1911.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to George Lindsay, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the Circuit

Court of the United States for the Northern District of Illinois, Eastern Division, wherein Grand Trunk Western Railway Company, is the Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the Judgment rendered against the said Plaintiff in Error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George A. Carpenter, Judge of the District Court of the United States, this twenty fourth day of April, in the year of our Lord one thousand nine hundred and eleven.

GEO. A. CARPENTER, *Dist. Judge.*

Service of the within citation on behalf of George Lindsay, defendant in error, is accepted this 29 day of April 1911.

JAMES C. McSHANE,
Attorney for Defendant in Error.

Endorsed: No. 29397. Circuit Court of the United States, Northern District of Illinois, Eastern Division. George Lindsay vs. Grand Trunk Western Ry. Co. Citation. Returnable May 24, 1911. John H. R. Jamar Clerk. Circuit Court of the United States Northern District of Illinois Eastern Division. Filed May 1 1911. John H. R. Jamar Clerk.

67 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 66, inclusive, is one of the copies of the printed record, printed under my supervision, and filed July 1, 1911, on which this cause was argued, heard and determined in the case of Grand Trunk Western Railway Company vs. George Lindsay, No. 1826, October Term, 1910, as the same remains upon the files and record of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this ninth day of January A. D. 1913.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

68 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the Fourth Day of October, 1910, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Ten, and of Our Independence the One Hundred and Thirty-fifth Year.

And afterwards, to-wit: On the fourteenth day of June, 1911, in the October Term aforesaid, came the Plaintiff in Error, by its counsel, Mr. G. W. Kretzinger and Mr. L. L. Smith, and filed in the office of the Clerk of this Court its certain Appearance, which is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit.
Oct. Term, 1910.

No. 1826.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE LINDSAY, Defendant in Error.

The Clerk will enter my appearance as counsel for the plaintiff in error.

G. W. KRETZINGER.
L. L. SMITH.

Endorsed: Filed June 14, 1911. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the Third Day of October, 1911, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Eleven, and of Our Independence the One Hundred and Thirty-sixth Year.

68½ And afterwards, to-wit: On the third day of October, 1911, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *October* 3, 1911.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Hon. Christian C. Kohlsaat, Circuit Judge.

1826.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
GEORGE LINDSAY.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on November 16, 1911.

And afterwards, to-wit: On the sixteenth day of November, 1911, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, *November* 16, 1911.

Court met pursuant to adjournment and was opened by proclamation of crier.

69 Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Arthur L. Sanborn, District Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1826.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
GEORGE LINDSAY.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of coun-

sel and on oral argument by Mr. George W. Kretzinger, counsel for plaintiff in error, and by Mr. James C. McShane, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the second day of January, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court, which is in the words and figures following, to-wit:

70 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, 1911.

No. 1826.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE LINDSAY, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Before Baker and Seaman, Circuit Judges, and Sanborn, District Judge.

Defendant in error, herein called plaintiff, was a switchman on defendant's railroad. On the night of September 21, 1908, he was severely injured by having his hand and arm caught and crushed while trying to lock the coupler between two freight cars, amputation of the arm near the shoulder being found necessary. Suit was brought February 11, 1909, in the state court, and removed to the Circuit Court by reason of diverse citizenship.

In the declaration are two counts, the first based upon both the federal safety appliance and employers' liability statutes, and the second on the liability act alone. In both counts it is alleged that the railroad and train were interstate, defendant then and there a common carrier in interstate commerce, plaintiff then and there employed in such interstate commerce; and that by reason of negligence of defendant, and without negligence on his part, plaintiff was injured. The first count claims a defective coupler as an additional ground of liability, under the automatic appliance statute, and alleges that by reason of such defective condition plaintiff was obliged to go between the cars to adjust the coupler,
71 and while so engaged the cars were negligently pushed together, resulting in the injury.

The evidence clearly showed the coupler defective; after repeated trials it would not work. It was tried by a number of workmen and the chief car inspector; and the lock was finally taken out and another put in. The old lock was not produced at the trial.

It was the plaintiff's duty to couple the car having the defective coupler to another. In order to do this it was necessary for him

to go between the cars. Before going between the cars plaintiff gave the conductor and his fellow switchman, and the engineer, a hard stop and stand signal, which, in railroad usage, meant that he was going between the cars, and that they should not be moved until he gave another signal. This signal was received and answered by the conductor and plaintiff's fellow switchman. While plaintiff was between the cars and endeavoring to adjust the defective coupler so it could be coupled, the cars were, without notice or warning to him, suddenly shoved together, and his right arm was thereby so crushed that it became necessary to amputate it within three inches of the shoulder. This movement of the cars, the evidence tends to show, was due to the engineer's supposition that a "come ahead" signal had been given.

No "come ahead" signal was given by the plaintiff, but the foreman of the switching crew got such a signal from some one, and gave it to the engineer. The foreman in the darkness could not tell who gave it, though he knew plaintiff was between the cars trying to couple them, and the signal came from that place. There was a car oiler with a lantern near plaintiff on the same side of the train, who testified that neither he nor plaintiff gave a "come ahead" signal, though the oiler says he made movements of his lantern while at work, which may have been mistaken by the foreman for a come on signal. There is no contradictory testimony except an affidavit as to what the testimony of the engineer would have been, if called, used by agreement by reason of his absence at the trial. This affidavit states that "plaintiff gave a signal to Conroy to come ahead and Conroy repeated it to him, as such engineer, and in obedience to such signals he began shoving said cars together." It is, however, perfectly evident that in the darkness the engineer could not see who gave the signal, his statement that plaintiff gave it being clearly not within his knowledge or observation. In the nature of things he could not know.

72 The jury found a general verdict for plaintiff and also answered in the affirmative the following special questions: "Do you find from the evidence that the defendant was guilty of a violation of the Safety Appliance Act, as charged in the first count of the declaration.

"If you find that the defendant was guilty of a violation of the Safety Appliance Act, as charged, do you find from the evidence that such violation was a proximate or concurrent cause of the plaintiff's injury?

"Considering all the evidence, including the plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care for his own safety."

By the Safety Appliance Act of March 2, 1893, 27 Stat. 531, 6 Fed. Stat. Ann. 752 (amended by act of May 30, 1908, 35 Stat. 476, Fed. Stat. Ann. Supp. 588, and by act of April 14, 1910, 36 Stat. 298), it is provided that it shall be unlawful for a common carrier engaged in interstate commerce to haul or permit to be hauled on its line any car used in moving interstate traffic not equipped with complete couplers coupling automatically by impact, and which

can be coupled without the necessity of men going between the ends of the cars. Also that employés do not assume the risk of the prohibited use of any such car, although continuing in their employment after the unlawful use is brought to their knowledge.

The following provisions of the Railroad Employers' Liability Statute of April 22, 1908, are material: Sec. 1. Every common carrier by railroad, while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting * * * by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances * * * or other equipment."

SEC. 3. * * * the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

SEC. 4 abolishes assumption of risk in case of the viola-
73 tion of such a statute as is mentioned in section 3. 35 Stat. 65, Fed. Stat. Ann. Supp., 584, 585.

Assignments of Error.

1. The declaration does not state a cause of action.

2. The court erred in admitting in evidence the following: Q. In the ordinary working of these couplers when they are in ordinary repair can a man shove them in with his heel as well as his hand? A. Yes. The question was duly objected to on the ground that the witness was not qualified, and as calling for a conclusion.

3. The court erred in not giving the following requested instruction: The court instructs the jury that if you believe from the evidence that the palintiff gave a 'come-ahead' signal to the switchman and engineer, and then went between the cars and in consequence thereof was injured, then the giving of the 'come-ahead' signal by the plaintiff was the proximate cause of the injury, the defect in the coupler being a remote cause, then the plaintiff is not entitled to recover.

Also in giving in place thereof the following: You are further instructed that if you believe from the evidence by a preponderance of the evidence that the plaintiff gave a 'come-ahead' signal to the switchman or engineer—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come-ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler. And, if you find that under the circumstances, the 'come-ahead' signal was the proximate cause for the injury then your verdict must be for the defendant.

4. The court erred in refusing the following requested instruction: The jury are instructed that if you believe from the evidence that plaintiff was guilty of negligence, which contributed to his injury, then he cannot recover.

Also in giving in place thereof the following: If after he started to go between the cars he has done something which was carelessly done, or which you can see from a preponderance of the evidence contributed proximately to the accident, then he cannot recover. If there be contributory negligence at all it depends not upon his assuming the risk under the circumstances in evidence in this case, but upon the care with which he acted while in the performance of the work which he assumed.

5. Plaintiff was guilty of contributory negligence which bars his right to a recovery.

74 6. The court erred in requiring the jury to make the special findings above stated.

7. The court erred in refusing the following instructions: The court instructs the jury that the testimony of defendant's car inspector Hanses that he did inspect the car in question and did not discover any defect in the coupler, that his testimony should be given the same consideration, other things being equal between the witnesses, as positive testimony.

8. The damages are excessive.

Sonborn, District Judge, after stating the facts as above, delivered the opinion of the Court:

1. The declaration is sufficient if it brings the case within the provisions of the safety appliance and employers' liabiltiy acts above stated and otherwise states a cause of action. It pleads, in both counts, that defendant was an interstate carrier, engaged in interstate commerce at the time of the injury, and that plaintiff was employed in such commerce. In addition it is stated in the first count that the automatic coupler, owing to its improper construction and defective and inoperative condition of repair, could not be coupled from the side of the car without the necessity of switchmen going between the end of the car having such coupler and the car or cars to which it was to be coupled. Other allegations are made showing how plaintiff was injured by reason of such defects, and that said cars were shoved together, without the express allegation that this was done by defendant. It is also stated that plaintiff was then and there employed by defendant as a switchman to work and switch with a certain engine and certain cars, which it was then and there operating upon its railroad in its business. This sufficiently shows that defendant shoved the cars together, by which the injury occurred. The question was not raised until after verdict, by a motion in arrest of judgment. Under such circumstances it may be inferred, if necessary, that defendant moved the cars. Sergeant v. Baubles, 215 Ill. 430; American Bridge Co. v. Peden, 129 Fed., 1004, 64 C. C. A. 581. And the declaration is in other respects good, and brings the case within the statute referred to.

2. The question asked the witness whether a coupler in ordinary repair could be closed with the foot as well as the hand. It was

error to receive the testimony because calling for a conclusion and invading the province of the jury, but in view of the
75 uncontradicted testimony as to the condition of the coupler, clearly showing beyond any controversy that the coupler was not in a state of ordinary repair, the error was not prejudicial.

3. Defendant asked an instruction based upon the testimony already stated in relation to the "come ahead" signal, to the effect that if it was given by plaintiff he could not recover. But it has been seen that the evidence shows the plaintiff did not give any such signal. It was not error, therefore, to refuse the instruction. The instruction actually given left the question to the jury, but defendant was not injured because the proof shows no such signal by plaintiff.

4. Defendant asked an instruction submitting generally the question of contributory negligence. This was refused and the jury charged that if plaintiff did something careless after starting to go between the cars, which contributed proximately to his injury, he could not recover. This was based upon Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 933, 220 U. S. 590, — Sup. Ct. —, — L. Ed. —; Delk, v. St. Louis & S. R. Co., 220 U. S. 580, — Sup. Ct. —, — L. Ed. —; and Chicago R. I. & P. R. Co. v. Brown, 185 Fed. 80, 107 C. C. A. 300 in this court. Plaintiff did not assume the risk caused by the defective coupler. Merely going between the cars, therefore, was not negligence if he used ordinary care in doing so. If he went in with care, and after he got there still continued to act with ordinary prudence, the jury were authorized to find he was not chargeable with contributory negligence, as they did; and their conclusion is fully justified by the record. Indeed, under the Employers' Liability Statute, even contributory negligence would not defeat recovery, only lessen damages; but the jury having found no want of care by plaintiff, and the record sustaining their conclusion, this provision of the liability statute is not involved.

5. This assignment involves the same question, whether plaintiff was negligent. The objection confused assumption of risk and contributory negligence. Whether plaintiff was negligent was fairly submitted to the jury, and decided for him. He testifies what he did after going between the cars, when he was justified in assuming that his "hard and fast" signal would be respected by the engineer. He gave no other signal, but by mistake the cars were pushed together and his arm crushed. It was negligence per se for defendant to use the car having the defective coupler, even though
76 the shoving of the cars together was accidental. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Chicago, B. & Q. R. Co. v. United States, 220 U. S 559. On the other hand, it was not negligent for plaintiff to attempt to use the defective coupler, because the statute expressly provides that he should not assume that risk by continuing to work after he knew the appliance was defective. The evidence tends to show plaintiff's diligence, not negligence, and the jury have decided in his favor.

6. This objection is that it was error for the court, in addition to a general verdict, to interrogate the jury whether defendant violated the safety appliance act, whether this was a proximate cause of the injury, and whether plaintiff used ordinary care for his own safety. Questions almost identical were submitted by request of the same counsel who asked them in this case, in Chicago, R. I. & P. R. Co. v. Brown, supra, where this court affirmed the judgment. The practice of submitting special questions in aid of a general verdict is an exceedingly convenient one, and is of long standing. In Walker v. New Mexico & Southern Pacific Railroad Co., 165 U. S. 593 at page 597, 17 Sup. Ct. 421, 41 L. Ed. 837, Justice Brewer said: "It was also a common practice when no special verdict was demanded and when only a general verdict was returned to interrogate the jury upon special matters of fact. Whether or no a jury was compelled to answer such interrogations, or whether, if it refused or failed to answer, the general verdict would stand or not, may be questioned. Mayor &c. v. Clark, 3 Ad. & Ell. 506. But the right to propound such interrogatories was undoubted and often recognized. Walker v. Bailey, 65 Maine, 354; Spurr v. Shelburne, 131 Mass. 429. In the latter case the court said (page 430): 'It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion. Dorr v. Fenno, 12 Pick. 521; Spoor v. Spooner, 12 Met. 281; Mair v. Bassett, 117 Mass. 356; Lawler v. Earle, 5 Allen, 22.' So that the putting of special interrogatories to a jury and asking for specific response thereto in addition to a general verdict is not a thing unknown to the common law, and has been recognized independently of any statute." In Rockefeller v. Wedge, 149
77 Fed. Rep. 130, at page 132, the court says: "The practice of calling on jurors to specialize their verdict in the way that was done is furthermore depreciated, and the right of the court to do so is challenged. But the right to interrogate a jury, and to act upon their findings, is directly sustained in Walker v. Southern Pacific R. R. 165 U. S. 593, 597, 17 Sup. Ct. 421, 41 L. Ed. 837, and City of Elizabeth v. Fitzgerald, 114 Fed. 547, 52 C. C. A. 321, and does not need to be vindicated here. And, far from being open to the criticism made of it, if it were oftener resorted to, it would save not a few mistrials; many rulings to which objection could otherwise be justly made being eliminated and rendered harmless. Clementson on Special Verdicts, 95, 286; 4 Mich. Law. Rev. 493." And in City of Elizabeth v. Fitzgerald, supra, the trial court upon a motion by defendant to direct a verdict, submitted special questions to the jury not covering all of the issues and upon those questions being answered granted the motion to direct. Not only is the practice beneficial, but it is difficult to see how it could properly be held erroneous, in any case, defendant suffering no injury. The case of Daube v. P. & R. Coal Co., 77 Fed. 23 C. C. A. 420, opinion by Judge Woods, is not in point, as that was a special verdict which did not cover the whole case, and no general verdict.

7. This assignment covers a requested instruction as to the testimony of the car inspector, by whom the car in question was inspected, but who had no recollection of the particular car, relying wholly on his record book. By the requested instruction his testimony was to be given the same consideration, other things being equal between the witnesses, as positive testimony. While this particular instruction was refused the court gave the ordinary one substantially in this language: The greater weight of evidence does not depend upon the number of witnesses testifying to the existence of a given fact. The jury are the sole judges of credibility, and the weight which should be given to their testimony; and might consider their interest, relation, demeanor, frankness or candor (or the contrary), corroboration or the reverse; and, all things considered, the jury should determine where the greater weight of evidence rests. This instruction as given was particularly applicable to the question of the coupler's condition, because so large a number testified to its faulty operation, as against the statement of the car inspector, who says he found nothing wrong with it. Under these circum-
78 stances we think the point presented by the request was sufficiently covered by the general instruction.

8. The last assignment raises the question whether $13,000 was an excessive recovery for the injury. Plaintiff was 23 years old at the time of the accident. As a result of his injuries his right arm was amputated, leaving less than three inches of a stump at the shoulder. As a switchman he earned from $110 to $115 a month. It was a year after the accident before he was able to work. His first work after the accident was keeping an account of the number of boxes turned out in a box factory, at which work he earned $2 per day. After leaving the box factory he has ever since worked as a switch-tender, earning $55 a month. If he had not been injured, he might have worked up in the railroad service. As it is, he is filling one of the most ordinary positions in such service, with little or no chance of promotion. Under these conditions the verdict should not be held excessive.

The judgment of the circuit court is affirmed.

Seaman, Circuit Judge, concurring.

I concur in the conclusion for affirmance and in the several ruling of the opinion, excepting one in reference to evidence of a "come ahead" signal given by the plaintiff below. Whatever may be deemed the preponderance of evidence thereupon, I believe the testimony of two witnesses—the engineer and the foreman of the switching crew—cannot, as matter of law, be rejected as testimony tending to prove that the signal was so given. Nevertheless, I am of opinion, that the requested instruction, mentioned in the third assignment of error, was rightly denied, as it was inconsistent with the provisons of the Act of April 22, 1908, referred to in the opinion. If the signal was given by the plaintiff, his action was negligence, contributing with the defective coupler, in causing the injury; and no instruction of law was authorized that one or the other contributing negligence was a proximate cause.

79 And afterwards, on the same day, to-wit: On the second day of January, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *January* 2, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Hon. Arthur L. Sanborn, District Judge.

1826.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
GEORGE LINDSAY.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

80 And afterwards, to-wit: On the thirtieth day of January, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Rehearing, which said Petition for Rehearing is not copied here nor made a part of this record.

And afterwards, on the same day, to-wit: On the thirtieth day of January, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Proof of Service of Petition for Rehearing, which said Proof of Service is not copied here nor made a part of this record.

And afterwards, to-wit: On the twenty-ninth day of March, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, *March* 29, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Hon. Arthur L. Sanborn, District Judge.

81 1826.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
GEORGE LINDSAY.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby granted. And it is further ordered that this cause be placed on the calendar of the April session of this term of this Court.

And afterwards, to-wit: On the twenty-third day of April, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Reply to the Petition for Rehearing, which said Reply is not copied here nor made a part of this record.

And afterwards, on the same day, to-wit: On the twenty-third day of April, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *April* 23, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Kenesaw M. Landis, District Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

82 Before Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Hon. Christian C. Kohlsaat, Circuit Judge.

1826.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
GEORGE LINDSAY.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on May 9, 1912.

And afterwards, to-wit: On the thirtieth day of April, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *April* 30, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1826.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
GEORGE LINDSAY.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause having been submitted on the printed record and briefs of counsel, the Court takes this matter under advisement.

83 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the First Day of October, 1912, of the October Term, in the Year of our Lord one thousand nine hundred and twelve and of our Independence the one hundred and thirty-seventh Year.

And afterwards, to-wit: On the twenty-fifth day of November, 1912, in the October Term last aforesaid, there was filed in the office

of the Clerk of this Court, the Opinion of the Court which said Opinion is in the words and figures following, to-wit:

84 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1911, April Session, 1912.

No. 1826.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE LINDSAY, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

On Rehearing Before Baker, Seaman, and Kohlsaat, Circuit Judges.

Per Curiam:

In the petition for rehearing defendant contends that three errors were committed in the opinion heretofore delivered by this court through Sanborn, District Judge.

1. In holding that, while the trial court erred in permitting witness Miller to testify that an automatic coupler in ordinary repair can be closed with the foot as well as the hand, nevertheless the error was not prejudicial because the uncontradicted evidence showed that the coupler in question was out of repair. (Paragraph 2 of the opinion.)

On re-examination we find that the evidence to prove that the coupler was out of repair was not entirely uncontradicted. So we inquire anew whether the testimony was admissible. Objections were that the answer gave only an opinion or conclusion, and that the witness was not qualified as an expert. Miller had worked for several years as a brakeman, and coupling was a large part of
85 his work. We think he was sufficiently qualified. He had already testified that he had put his "heel against the knuckle trying to push it in, and it would not go." His testimony (objected to) that couplers in ordinary repair can be closed with the foot as well as the hand, might be deemed a matter of fact learned from observation and experience; but if it be taken as a matter of opinion, we consider the testimony admissible. Automatic couplers, like buffers, switches, frogs, cattle-guards, spark-arresters, and other railroad machines and appliances, are not to be supposed to come so fully within the knowledge of average jurymen that experts may not properly be allowed to testify respecting their nature, operation, and normal condition. Gila Valley R. Co. v. Lyon, 203 U. S. 465; Troxell v. Delaware, L. & W. R. Co., 180 Fed. 871; Baltimore & P. R. Co. v. Elliott, 9 App. D. C. 341; Schroeder v. Chicago & N. W. R. Co., 128 Ia. 365; Johnson v. Detroit & M. R. Co., 135 Mich. 353; Buckalew v. Quincy, O. & K. R. Co., 107 Mo. App. 575; Jones v. Shaw, 16 Tex. Cir. App. 290; San Antonio & A. P. R. Co. v. Waller, 27 Tex. Cir. App. 44.

2. In holding that there was no evidence on which to base defendant's requested instruction that if plaintiff gave a "come-ahead" signal to the engineer and then went between the cars and in consequence thereof was injured, then the giving of the "come-ahead" signal was the proximate cause and plaintiff could not recover. (Paragraph 3 of the opinion.)

On re-examination we agree with the view expressed by Judge Seaman in his concurring opinion that there was conflicting evidence respecting the giving of the "come-ahead" signal, but that, even so, the requested instruction was properly refused. If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted "in whole or in part" from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act.

3. In overruling the fourth assignment of error. (Paragraph 4 of the opinion.) For the reasons given in the opinion, we believe that the trial court committed no error against defendant in giving the challenged instruction.

86 The judgment is reaffirmed.

A true Copy.
Teste:

____ ____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

87 And afterwards on the same day, to-wit: On the twenty-fifth day of November, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, *November* 25, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1826.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
GEORGE LINDSAY.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby re-affirmed with costs.

And afterwards, to-wit: On the thirteenth day of December, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which Assignment of Errors is in the words and figures following, to-wit:

88 In the United States Circuit Court of Appeals for the Seventh Circuit.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE LINDSAY, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Assignment of Errors.

Now comes plaintiff in error and in connection with its petition for writ of error says that in the record and proceedings aforesaid of the said United States Circuit Court of Appeals for the Seventh Circuit, and in the rendition of final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error, in this, to-wit:

1. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division thereof, for the sum of thirteen thousand dollars ($13,000) in favor of defendant in error and against plaintiff in error.

2. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause for a new trial.

3. Said Circuit Court of Appeals erred in holding that
89 under the Federal Employers' Liability Act of April, 1908, "it is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

4. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States and in refusing to sustain the first assignment of error of plaintiff in error, which was as follows:

"The court erred in refusing to instruct the jury, upon defendant's request, at the close of all the evidence, to return a verdict finding the defendant not guilty."

5. The said Circuit Court of Appeals erred in affirming the judgment of the said Circuit Court of the United States and in refusing to sustain the second assignment of error of plaintiff in error, which was as follows:

"The court erred in refusing to give to the jury the second instruction by defendant, as follows:

'The court instructs the jury that if you believe from the evidence that plaintiff gave a 'come ahead' signal to the switchman and engineer, and then went between the cars and in consequence thereof was injured, then the giving of the come ahead signal by plaintiff was the proximate cause of the injury, the defect in the coupling being a remote cause and plaintiff is not entitled to recover.'

And modifying the same as follows:

'You are further instructed that if you believe from the preponderance of the evidence, that the plaintiff gave a 'come ahead' signal to the switchman or engineer—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that under the circumstances the 'come ahead' signal was the proximate cause of the injury, then your verdict must be for the defendant.'

And in giving the same as modified to the jury."

6. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court and in refusing to sustain the third assignment of error of plaintiff in error, which was as
90 follows:

"The court erred in refusing to give to the jury each and every instruction requested by defendant and refused by the court."

7. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States and in refusing to sustain the sixth assignment of error, which was as follows:

"The court erred in refusing to instruct the jury, upon defendant's request, that the testimony of defendant's car inspector, that he did inspect the car in question and found no defect in the couplers, should be given the same consideration, other things being equal between the witnesses, as positive testimony."

8. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States and in refusing to sustain the eighth assignment of error of plaintiff in error, which was as follows:

"The court erred in instructing the jury that reasonable care on

the part of defendant in providing and maintaining the automatic coupler is no defense."

9. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States and in refusing to sustain the ninth assignment of error of plaintiff in error, which was as follows:

"The court erred in requiring the jury to make certain special findings requested by plaintiff, because such special findings did not cover all the issues in the case."

10. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States and in refusing to sustain the tenth assignment of error of plaintiff in error, which was as follows:

"The court erred in the following ruling on evidence:

91 In admitting the testimony of the witness, Miller, called by plaintiff and interrogated by plaintiff's counsel, as follows: 'Q. In the ordinary working of these couplers, when they are in ordinary repair, can a man shove them in with his heel as well as his hand?'

The question was objected to on the ground that the witness was not qualified, and that it called for a conclusion. The witness answer: 'Yes', and the court overruled defendant's motion to strike out the answer, and defendant excepted."

11. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States and in refusing to sustain the twelfth assignment of error of plaintiff in error, which was as follows:

"The declaration of plaintiff fails to state a cause of action against the defendant."

12. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States and in refusing to sustain the thirteenth assignment of error of plaintiff in error, which was as follows:

"The damages are excessive and unwarranted by the evidence."

13. The said Circuit Court of Appeals erred in entering judgment against plaintiff in error in favor of defendant in error for costs of suit in the said Circuit Court of Appeals.

Wherefore said plaintiff in error prays that for the errors aforesaid and other errors appearing in the record of the said United States Circuit Court of Appeals in the above entitled cause, to the prejudice of plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the said Circuit

92 Court of the United States with directions to grant a new trial of said cause, and for such other proceedings in said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises.

G. W. KRETZINGER,
Attorneys for Plaintiff in Error.

Endorsed: Filed Dec. 13, 1912. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the thirteenth day of December, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Writ of Error, which said Petition for Writ of Error is in the words and figures following, to-wit:

93 In the United States Circuit Court of Appeals for the Seventh Circuit.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE LINDSAY, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Your petitioner, Grand Trunk Western Railway Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Seventh Circuit; that a judgment was herein rendered on the 2nd day of January, 1912, affirming the judgment of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division; that a petition for rehearing was filed by petitioner and granted by this court on the 29th day of March, 1912, and the cause was reheard by this court and the judgment reaffirmed on the 26th day of November, 1912; that the matter in controversy in said suit exceeds one thousand dollars besides costs, to-wit: the sum of thirteen thousand dollars ($13,000); that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different states, but arose under laws of the United States, as appears from defendant in error's declaration, to-wit: the Safety Appliance Act and the Federal Employers' Liability Act. The decision of the case involved
94 a construction and interpretation of the Federal Employers' Liability Act of April, 1908, and which involves a controversy as to a right which depends upon the effect or construction of the Federal Employers' Liability Act of April, 1908, and this court in its opinion gave a construction to said act claimed by petitioner to be erroneous; that this cause does not arise under the patent laws nor the revenue laws nor the criminal laws, and it is not an admiralty case—that it is a proper case to be reviewed by the Supreme Court of the United States upon a writ of error.

Wherefore your petitioner respectfully prays that a writ of error be allowed in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by plaintiff in error may be reviewed and if error

be found, corrected according to the law and customs of the United States.

GRAND TRUNK WESTERN RAILWAY COMPANY,
By G. W. KRETZINGER, *Its Attorneys.*

The foregoing petition is granted, and a writ of error allowed as prayed, to operate as a supersedeas upon plaintiff in error, giving bond according to law, in the sum of twenty thousand dollars.

FRANCIS E. BAKER,
Circuit Judge.

Dec. 13, 1912.

Endorsed: Filed Dec. 13, 1912. Edward M. Holloway, Clerk.

95 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 28, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and stipulation relating thereto, the Petition for Rehearing, the Proof of Service of Petition for Rehearing, and the Reply to the Petition for Rehearing) in the case of Grand Trunk Western Railway Company vs. George Lindsay, No. 1826, October Term, 1910, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this ninth day of January, A. D. 1913.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

96 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Grand Trunk Western Railway Company, Plaintiff in error and George Lindsay, Defendant in error a manifest error hath happened, to the great damage of the said

Grand Trunk Western Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court of the United States at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by:
FRANCIS E. BAKER,
Circuit Judge.

Filed Dec. 13, 1912. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA,
Seventh Judicial Circuit, ss:

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this thirteenth day of December, A. D. 1912.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Copy deposited for the defendant in error in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to George Lindsay, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington D. C. within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit wherein Grand Trunk Western

Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the Judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis E. Baker Judge of the Circuit Court of the United States this 13th day of December, in the year of our Lord one thousand nine hundred and twelve.

FRANCIS E. BAKER,
Circuit Judge.

98 [Endorsed:] No. 1826. United States Circuit Court of Appeals, Seventh Circuit. Grand Trunk Western Railway Company, Plaintiff in error, vs. George Lindsay. Citation. Filed Dec. 13, 1912. Edward M. Holloway, Clerk.

Service of the within citation on behalf of George Lindsay, defendant in error, is accepted at Chicago, Illinois, this 13th day of December, 1912.

JAMES C. McSHANE,
Attorney for George Lindsay,
Defendant in Error.

Endorsed on cover: File No. 23,500. U. S. Circuit Court Appeals, 7th Circuit. Term No. 425. Grand Trunk Western Railway Company, plaintiff in error vs. George Lindsay. Filed January 13th, 1913. File No. 23,500.

FILED
JAN 2 1914
JAMES D. MAHER
CLERK

No. 425

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

GEORGE LINDSAY,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Seventh Circuit.

AFFIDAVIT IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DIRECT THE CLERK OF THIS COURT TO NOW REQUIRE THE PLAINTIFF IN ERROR TO DEPOSIT COST OF PRINTING RECORD.

G. W. KRETZINGER, JR.,
Attorney for Plaintiff in Error.

Geo. Hornstein Co., Printer, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

GEORGE LINDSAY,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Seventh Circuit.

AFFIDAVIT IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DIRECT THE CLERK OF THIS COURT TO NOW REQUIRE THE PLAINTIFF IN ERROR TO DEPOSIT COST OF PRINTING RECORD.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

L. L. SMITH, on oath, states that he is one of the attorneys for plaintiff in error in the above entitled cause. Affiant states that he has read over the affidavits of defendant in error and of James C. McShane, his counsel. Affiant states that this suit was brought by defendant in error in the Superior Court of Cook County, Illinois, based solely upon a federal law, to-wit: The Federal Safety Appliance Act.

The cause was removed to the United States District Court upon motion of plaintiff in error; and a trial was had in that court before a jury and a verdict and judgment rendered in favor of defendant in error against plaintiff in error for the sum of $13,000. The trial court allowed a writ of error upon motion of plaintiff in error to the United States Circuit Court of Appeals for the Seventh Circuit. The record was filed and the case duly argued in that court by counsel for the respective parties upon both printed briefs and oral arguments upon plain errors assigned by plaintiff in error. No motion was made in that court nor was there at any time any intimation made by defendant in error, or his counsel, that said writ of error was sued out for the purpose of delay. The Court of Appeals was in such great doubt upon the plain errors urged by plaintiff in error for a reversal of the judgment that a rehearing was granted after an affirmance of the judgment below, and the case was reheard and fully reargued upon additional briefs filed by both parties, and the cause again taken under advisement by the court, and on November 25th, 1912, an additional opinion was filed, reaffirming the judgment (201 Federal Reporter, 836). Affiant further states that the said Court of Appeals upon the motion of plaintiff in error, allowed a writ of error to this court, and ordered that the same operate as a supersedeas upon plaintiff in error giving bond in the sum of twenty thousand dollars ($20,000), which was done. Affiant states that said writ of error allowed by the Court of Appeals

to this court was not sued out for delay but in order that plain errors might be corrected, the judgment reversed and justice done.

L. L. SMITH.

Subscribed and sworn to
before me this 27th day
of December, A. D. 1913.

EDWARD R. GANNON,
Notary Public.

SUGGESTIONS IN OPPOSITION TO MOTION.

No valid reason has been suggested by counsel why Rule 10 of this court recently promulgated in regard to the printing of the record should be abrogated and an exception made in this instance in favor of defendant in error.

If your Honors will read the two opinions of the Circuit Court of Appeals below (201 Fed., 836), you will observe that upon the first hearing the judgment was not rendered by a unanimous court, Judge Seaman disagreeing with the other members of the court upon a material and vital question involved; that the court subsequently granted a rehearing and upon further consideration reaffirmed the judgment. This would seem to be a conclusive answer to counsel's contention that this writ of error to this court being upon the same record was sued out by plaintiff in error for delay alone.

The important question and plain errors assigned are an erroneous construction of the Safety Appliance Act, which was decided by the Court of Appeals, adversely to plaintiff in error, a question upon which that court was in grave doubt. The questions involved have never been passed upon by this court.

Defendant in error asks the court to set aside its rules in his favor alone and to grant him a privilege not accorded to other litigants, because, he says, he has not sufficient funds to print the record at this time. As well might he ask this court to consider his

case upon written instead of printed briefs for the same reason. He is amply protected by the rules which provide that if plaintiff in error fails to have the record printed when the case is reached on the call of the docket the writ of error will be dismissed.

Respectfully submitted.

G. W. KRETZINGER, JR.,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
JAN 2 1914
JAMES D. MAHER
CLERK

No. 425

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

GEORGE LINDSAY,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR ORDER TO CLERK TO PRINT RECORD.

JAMES C. McSHANE,
Attorney for Defendant in Error.

Geo. Hornstein Co., Printer, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

GEORGE LINDSAY,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR ORDER TO CLERK TO PRINT RECORD.

And now comes defendant in error, by his attorney, and moves the court for an order directing the Clerk of this court to call upon the plaintiff in error forthwith to make the necessary deposit to cover the costs of printing the record in the above entitled cause, and to cause said record to be printed upon said deposit being made, so as to enable defendant in error to make a motion herein to affirm the judgment of the Court of Appeals, on the ground that it is manifest that the writ of error in this case was prosecuted for delay only, and in support of this motion, defendant in error submits the following affidavits and suggestions.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

AFFIDAVITS.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

GEORGE LINDSAY, being first duly sworn, deposes and says that his right arm was crushed off between the couplers of two freight cars, which he was attempting to couple, while employed by plaintiff in error, as a switchman, on September 21, 1908, at Chicago, Illinois; that he, afterwards, to-wit, on December 24, 1908, commenced a suit against plaintiff in error, in the Superior Court of Cook County, to recover damages on account of said injuries; that said suit was afterwards removed by plaintiff in error to the United States Circuit Court, in and for the Northern District of Illinois; that the declaration in said suit charged, and the proof showed, that defendant in error's injury was due to plaintiff in error's violation of the United States Safety Appliance Act; and it likewise charged, and the proof showed, that both plaintiff in error and defendant in error were engaged in interstate commerce at the time of the accident, and hence the case falls within the provisions of the Federal Employers' Liability Act; that the trial of said cause resulted in a judgment for $13,000, and costs of suit, in favor of defendant in error; that plaintiff in error prosecuted an appeal from said judgment to the United States Circuit Court of Appeals for the 7th Circuit, and said judgment was affirmed by the latter court on January 2, 1912. (See *Grand Trunk Western Ry.*

Co. v. *Lindsay*, 201 Fed., 836; 120 U. S. C. C. A., 166.)

Affiant further states that plaintiff in error subsequently sued out a writ of error to the Circuit Court of Appeals, and in accordance with said writ of error plaintiff in error filed a transcript of the record of said Circuit Court of Appeals with the Clerk of this court on or about January 12, 1913.

Affiant further states that he then believed, and still believes, that said writ of error was sued out solely for the purpose of delay; and he then desired, and still desires, to make a motion in this court as soon as possible, to affirm the judgment of the said Circuit Court of Appeals on the ground that it is manifest that the writ of error was taken for delay only. Affiant further states that shortly after said transcript of record was filed in this court, and again during the present month, affiant, through his attorney, requested the Clerk of this court to cause the said transcript of record to be printed, so that this affiant would be in a position to make said motion to affirm. But the said Clerk, in answer to said requests, stated that in accordance with the practice he would not call upon plaintiff in error to make the deposit necessary to the printing of said record for a long time to come, but that if this affiant would advance $170, the amount estimated to be necessary to cover the costs of printing said record, the record would be printed forthwith.

Affiant further states that he has no money, or property, of any kind, and that owing to the loss of his arm he has not been able to earn more than is absolutely necessary to his support, and that there-

fore he was, and is, unable to advance said sum of $170, or any part thereof.

Affiant further states that he intends, as soon as said record is printed, to make a motion in this court to affirm the judgment of said Circuit Court of Appeals on the ground that it is manifest that the writ of error was prosecuted for delay only, and he is advised by his attorney and believes, that if said motion is made, it will in all probability be granted by this court.

And further affiant saith not.

GEORGE LINDSAY.

Subscribed and sworn to before me this 23rd day of December, A. D. 1913.

JOHN R. McSHANE,
Notary Public.

(Seal)

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

JAMES C. MCSHANE, being first duly sworn, deposes and says that he is a regularly licensed attorney and counselor at law, and has been duly admitted to practice in this court; that he has conducted defendant in error's side of the case, mentioned in the foregoing affidavit, from the time said case was commenced until the present time, and he expects to represent defendant in error in said case until its conclusion. Affiant further states that it is his intention, as defendant in error's attorney, to make a motion in this court to affirm said judgment of the Circuit Court of Appeals as soon as the transcript of the record of said Circuit Court of Appeals is printed.

And affiant further states that from a thorough and painstaking investigation of the law and facts in said case, he is of the opinion that the writ of error in this case was prosecuted for delay only, and that this court will sustain a motion to affirm the judgment of the Circuit Court of Appeals upon that ground, when said motion is made.

And further affiant saith not.

JAMES C. MCSHANE.

Subscribed and sworn to before me this 23d day of December, A. D. 1913.

JOHN R. MCSHANE.

(Seal) *Notary Public.*

SUGGESTIONS IN SUPPORT OF MOTION.

It seems to be the rule that this court will not entertain a motion to affirm until after the record is printed. (*Crane Iron Co.* v. *Hoagland*, 108 U. S., 5.) It would also seem that Rule 10 contemplates that the Clerk should call upon the plaintiff in error to make the necessary deposit for printing the record, at or shortly after the transcript is filed in this court.

In *Bradstreet Co.* v. *Higgins*, 114 U. S., 262, the court said:

"Under Rule 10, Section 2, of this court, it was the *duty* of the plaintiff in error to cause the record to be printed and to pay all the costs and fees incident thereto *in time for use when required in the progress of the cause.* * * * In this case plaintiff in error neglected to have the record printed *by the time it was wanted by the defendant in error on his motion to dismiss.*"

The defendant in error in that case advanced the money necessary to print the record, and the sum so advanced was taxed as costs against plaintiff in error, when the motion to dismiss was sustained.

From defendant in error's affidavit it is apparent that it is impossible for him to advance the money necessary to print the record in this case, and while the practice may *ordinarily* justify the Clerk in refusing to call upon a plaintiff in error for a deposit, to cover the printing of the record, until such time

as the case is closely approaching final hearing, yet we submit that in a case like this, where it is shown by the affidavits of the defendant in error, and his attorney, that they believe that the writ of error was sued out for the purpose of delay only, and that they intend to make a motion to affirm upon that ground as soon as the record is printed, and when it is apparent that the defendant in error is unable to advance the money necessary to print the record, the Clerk should be required to call upon the plaintiff in error for a deposit to cover the printing of the record, and to cause the record to be printed forthwith.

Plaintiff in error must ultimately make the deposit for printing the record, and it is consequently no hardship to it to be required to make the deposit now. In cases of this kind, the injured employes are generally unable to advance the very considerable sum usually required to secure the printing of the record, and if no exception is made to the Clerk's practice, above referred to, the suing out of writs of error, in such cases, must necessarily occasion great hardship to the injured employe, in fact it amounts to a denial of the right to make a motion to affirm in such cases. It must be apparent to the court that writs of error are frequently sued out in cases of this kind, when the judgment of the Circuit Court of Appeals should have been treated as final, and, we think, the granting of motions like this will tend to discourage such practice. While the question as to whether the motion to affirm in this case would be sustained, or denied, is not directly

involved, yet if the court will read the opinion of the Circuit Court of Appeals we think it will be convinced that there are good grounds for the making of a motion to affirm, and that fact may properly be considered in passing upon this motion.

Respectfully submitted.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 425.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
GEORGE LINDSAY,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

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INDEX.

Appendix:

Employers' Liability Act..... 28

Safety Appliance Act..... 32

Statement of facts..... 1

Specification of errors..... 10

1. The Circuit Court of Appeals erred in affirming the judgment below upon a theory other and different from that upon which the case was tried. The Court of Appeals apparently conceding that upon the theory upon which the judgment was obtained that judgment was erroneous and should be reversed.

2. Under either the theory adopted by the trial court or the Circuit Court of Appeals upon rehearing, the refusal to give the instruction requested by defendant in reference to the "come-ahead" signal by plaintiff was erroneous.

3. The Circuit Court of Appeals erred in sustaining the trial court in refusing the fifth instruction requested by plaintiff.

4. The Circuit Court of Appeals erred in refusing to sustain each and every error assigned upon the record and urged by defendant in said Circuit Court of Appeals.

AUTHORITIES.

American R. R. Co. v. *Birch*, 224 U. S., 557..... 25
Atchison, etc., Ry. Co. v. *Calhoun*, 213 U. S., 1... 20
Beutler v. *Railway Co.*, 224 U. S., 85..... 17
Caswell v. *Worth*, 5 Ellis & Blackburn's Rep., 848 24
Chicago, etc., Ry. Co. v. *McKean*, 40 Ill., 229... 23
Chicago, etc., Ry. Co. v. *Brown*, 229 U. S., 317..11-15
Chicago, etc., Ry. Co. v. *King*, 222 U. S., 222.... 11
Cincinnati, etc., Ry. Co. v. *Mealer*, 50 Fed., 725. 21
Cooley on Torts, 99..... 22
Delk v. *Railway Co.*, 220 U. S., 580..... 17
Hatcher v. *Insurance Co.*, 184 Fed., 23..... 13
Indianapolis, etc., Ry. Co. v. *Blackman*, 63 Ill., 121..... 23
L. & N. Railway Co. v. *Kelly*, 63 Fed., 407..... 27
Mobile, etc., Ry. Co. v. *Wilson*, 176 Fed., 127.... 16
New York R. R. Co. v. *Estill*, 147 U. S., 592..... 13
Miner v. *McNamara*, 72 Atl., 138..... 21
Norfolk Ry. Co. v. *United States*, 177 Fed., 630.. 26
Schafer v. *Railroad Co.*, 105 U. S., 249..... 21
St. Louis, etc., Ry. Co. v. *Hesterly*, 228 U. S., 702 14
San Juan Co. v. *Requena*, 224 U. S., 97..... 13
Schlemmer v. *Railway Co.*, 220 U. S., 590..... 17
Thornton on Federal Employers' Liability and Safety Appliance Acts, 104..... 19
Union Pacific Ry. Co. v. *Callaghan*, 56 Fed., 988 22
Yazoo, etc., Ry. v. *Greenwood Co.*, 227 U. S., 1.. 13

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is error sued out under Act of March 3, 1891, Section 6, 26 Statutes at Large, 828, to review a judgment of the Circuit Court of Appeals, Seventh Circuit, affirming a judgment of the Circuit Court for the Northern District of Illinois, for $13,000, in an action brought by George Lindsay, defendant in error, herein called "plaintiff," against the Grand Trunk Western Railway Company, plaintiff in error, herein called "defendant," for personal injuries received by him while working as a switchman in the defendant's yards at Elsdon, Illinois.

The suit was brought in the State Court and re-

moved to the Federal Court upon petition of defendant.

The right to recover in this suit was expressly based by plaintiff in the Circuit Court upon a violation by defendant of the Federal Safety Appliance Act.

The declaration consists of two counts, the first count, after alleging that defendant was an interstate carrier and engaged in commerce between the states, and that plaintiff was employed by it in such commerce, expressly charges as the ground of liability upon the part of defendant a violation by it of the Federal Safety Appliance Act. (Printed Trans., 4.) The second count charges negligence of certain employees of defendant in moving together certain cars while plaintiff was at work adjusting a coupler between two of the cars when those employees knew, or should have known plaintiff's position between the cars. (Printed Trans., 5.)

Both counts allege that plaintiff was in the exercise of due care for his safety at the time of the accident. (Printed Trans., 4-5.) At plaintiff's request the court propounded to the jury an express interrogatory as to the exercise of due care upon his part (Printed Trans., 36-42), and likewise the court specifically instructed the jury as to whether or not the plaintiff assumed the risk or was guilty of contributory negligence. (Printed Trans., 41.) The theory, therefore, upon which the trial proceeded and the judgment was obtained in the Circuit Court was that the first count was framed under the Safety Appliance Act and the second count under the

common law. The court stated in its charge to the jury:

> "To sustain the contention of the plaintiff it is necessary for him to show, by a preponderance of evidence, first, that at the time of the accident he was working on a car that was engaged in moving interstate traffic; and, second, that at the time of the accident the car then in use was not equipped with automatic couplers as required by the Act of Congress." (Printed Trans., p. 40.)

And the court further directed the jury:

> "The second count of the declaration charged common law negligence in starting the train," etc. (Printed Trans., p. 43.)

This was the theory upon which the case was tried, the jury instructed and the ground of judgment, and not upon the contention that plaintiff's right to recover was founded upon the Federal Employers' Liability Act.

For the purposes here, the facts are as follows: Plaintiff was an experienced switchman in defendant's switch yard at Elsdon, Illinois. There were three men in the crew of which plaintiff was a member, namely: Daniels, conductor; Conroy, head switchman; and plaintiff, rear switchman. In addition to this crew, Armstrong was engineer in charge of the switch engine.

There are two main tracks running through this yard, north and south. The west track is used for east-bound traffic and the east track is used for west-bound traffic, and east of this and parallel to it is a yard track, and from this yard track a num-

ber of side-tracks branch off, of which track 18 is one. (Printed Trans., p. 14.) There is a connection between the east-bound and west-bound track south of 51st street, which runs northeast and southwest. There is also a connection which runs the same way leading from the east track to the lead. On the night of the accident this crew had placed four cars on the west main track just north of 51st street, and were waiting for a number of cars loaded with beef to come from the stock yards. These expected cars were designated the "beef run." Plaintiff cut the engine from the four cars and in a few minutes the beef run arrived, and the switch engine coupled on to the cars. (Printed Trans., 14.) Plaintiff himself was giving signals to the engineer, and it was in the switching operation of these cars that he was injured. The accident happened at about 6:40 p. m. September 21, 1908.

Plaintiff testified that he was attempting to adjust a coupler of car 7979, which had failed to couple automatically and was separated about two feet from another car, when the cars suddenly came together and his arm was caught and cut off. The evidence shows that all the members of this crew were on the east side of the cars at the time of the accid nt.

Plaintiff testified (Printed Abst., p. 15):

> "Conroy was up about 51st street. I could just see their lanterns. It was too dark to recognize anyone."

It was necessary for the members of the switching crew to continuously signal, and in fact to conduct all of their train movements for working at

that point by signals. The lights of all the lanterns could be seen as "come-ahead" and "stand-still" signals were given.

On cross-examination Lindsay testified (Printed Trans., 18):

> "I gave them a signal to back up and they backed up and went south over the connection of the west-bound main, then came north. * * *"

Lindsay further testified (Printed Trans., 18): "* * * and then left them come ahead," etc. "That was when my hand was caught."

The evidence shows that Lindsay was an active working member of that crew, in the sense of moving and directing the movements of the cars. That while it was dark at the time they were coupling and uncoupling these cars, they all had lighted lanterns, which could not only be seen by other members of the crew, but which could be and were seen by each member of the crew, and the member carrying such lantern could be and was directed by signals made by other lighted lanterns, so that each one of the crew, including the engineer, conductor and switchman, could and did signal to each other and their signals could be seen and understood and obeyed by each other.

Daniels, foreman of the switching crew, testified (Printed Trans., 26) without dispute, that all the couplings had been made *but one*, and Mr. Lindsay was to make the coupling.

This was when Lindsay gave the come-ahead signal. Daniels testified that Lindsay was at the place from which the signal came and Lindsay had a light-

ed lantern in his hand and a few minutes before that he had given just such a signal as the engineer observed the second time.

Daniels further testified (Printed Trans., 27):

> "That is the time Mr. Lindsay went there with the purpose of making that coupling. We got a signal to come ahead north; the cars struck and the coupling missed. We got a signal to stop. I suppose the signal to stop came from Mr. Lindsay. That was his place and he was there. We had a signal to stop and we stood still and we got another signal to go ahead."

He also testified:

> "Of course, it was dark and I answered the signal to stop." (Printed Trans., 27.)

This was the second time that Lindsay had signaled to come ahead and signaled to stop.

He testified further (Printed Trans., 27):

> "We had a signal to stop and we stood still, and we got another signal to go ahead. * * * I repeated the signal to the engineer. It was my business to do that. I repeated it to Conroy, too. Then the engineer went ahead.
>
> "Q. And that was the occasion the plaintiff was injured? A. Yes, sir. * * * Well, I don't know, except after we got the signal to go ahead we came ahead and the next thing I knew the man was hurt."

It was admitted by plaintiff that if Armstrong were present his testimony would be as follows: That he as engineer

> "shoved said cars together in response to a signal which plaintiff gave to him as such en-

> gineer, to shove ahead; and, that the cars did not couple at that time, which is frequently the case even when automatic couplers are in perfect condition; that, thereupon, plaintiff gave Conroy a signal to pull ahead, and Conroy repeated said signal to him" (Armstrong), " 'pull ahead,' so that said cars were separated about the space of one car-length; that at said time plaintiff was at a point near where said coupling was to be made; that thereupon plaintiff gave a signal to Conroy to come ahead, and Conroy repeated it to him, as such engineer, and in obedience to such signals he began shoving said cars together; that he had no knowledge at the time of shoving the cars together said second time that plaintiff was or would go between them, or that he would place himself in a position of danger in respect thereto." (Printed Trans., 35-36.)

The engineer then testifies as to Daniels giving him a stop signal; that he stopped immediately the "engine and cars."

This was no doubt the way the accident happened, and the Court of Appeals found that there was evidence to the above effect. (Printed Trans., 66.) Defendant asked the court to give the jury the following instruction (Printed Trans., 37):

> "The court instructs the jury that if you believe from the evidence that plaintiff gave a 'come-ahead' signal to the switchman and engineer, and then went between the cars and in consequence thereof was injured, then the giving of the 'come-ahead' signal by plaintiff was the proximate cause of the injury, the defect in the coupling being a remote cause, and plaintiff is not entitled to recover."

But the court refused the instruction and sub-

mitted the question to the jury as one of fact. The Circuit Court of Appeals, where the case was carried by defendant, held:

> "In the declaration are two counts, the first based upon both the Federal Safety Appliance Act and the Employers' Liability Statute, and the second on the Liability Act alone." (Printed Trans., 56.)

The majority of the Judges of the Court of Appeals at first determined the case upon the theory of the trial court, and decided all questions assigned for error by defendant as arising upon that theory, but held that it was not error for the trial court to refuse the requested instruction above quoted as to the giving of the "come-ahead" signal by the plaintiff, because there *was no evidence upon which to base it.* Judge Seaman, however, in a separate opinion, thought there was evidence upon which to base the request, but that its refusal was not error as the instruction was inconsistent with the provisions of the Federal Employers' Liability Act. (Printed Trans., 62.)

The Court of Appeals, however, subsequently, upon defendant's petition, granted a rehearing, and upon such rehearing held that there was evidence upon which to base the requested instruction, but justified its refusal as follows (Printed Trans., 67):

> "If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's

> negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

The defense in the trial court was directed to the case made against it by the plaintiff in that court, and the Court of Appeals, upon the original hearing affirmed the judgment upon the theory of the trial below, but later, seeing its error, granted a rehearing and reaffirmed the judgment upon another and different theory not urged below, and to which the defense of the defendant was not directed.

If, upon rehearing, the Court of Appeals had determined the case upon the theory of the trial below, to-wit, the Safety Appliance Act and the common law, it is clear from its opinion that the judgment would have been reversed instead of affirmed.

Defendant contends:

1. That plaintiff, having secured the judgment for an alleged violation by defendant of the Safety Appliance Act, and defendant having interposed its defense upon that ground, cannot, if that judgment is erroneous, sustain it as a recovery under the Employers' Liability Act.

2. Even under the Employers' Liability Act the refusal of the instruction as to the "come-ahead" signal was erroneous.

3. The evidence as to the condition of the coupler being disputed, the court erred in refusing Instruction 5th requested by defendant.

For ready reference, we have printed in full and attach as an appendix to this brief, a copy of both the Federal Employers' Liability Act and the Safety Appliance Act.

Specifications of Errors Relied Upon.

I.

The Circuit Court of Appeals erred in affirming the judgment below upon a theory other and different from that upon which the case was tried. The Court of Appeals apparently conceding that upon the theory upon which the judgment was obtained that judgment was erroneous and should be reversed.

II.

Under either the theory adopted by the trial court or the Circuit Court of Appeals upon rehearing, the refusal to give the instruction requested by defendant in reference to the "come-ahead" signal by plaintiff was erroneous.

III.

The Circuit Court of Appeals erred in sustaining the trial court in refusing the 5th instruction requested by plaintiff.

IV.

The Circuit Court of Appeals erred in refusing to sustain each and every error assigned upon the record and urged by defendant in said Circuit Court of Appeals.

BRIEF OF ARGUMENT.

We contend that in this case plain error was committed by the lower courts within the meaning of the rulings of this court in *Chicago, Etc., Ry. Co.* v. *King*, 222 U. S., 222; and *Chicago, Etc., Ry. Co.* v. *Brown*, 229 U. S., 317; cases brought here for review under Section 6, 26 Stat. at Large, 828.

I.

THE JUDGMENT AGAINST DEFENDANT HAVING BEEN OBTAINED UPON THE TRIAL BY PLAINTIFF UPON THE THEORY OF A VIOLATION BY DEFENDANT OF THE SAFETY APPLIANCE ACT CANNOT BE SUSTAINED UPON APPEAL UPON A DIFFERENT THEORY, ONE WHICH DEFENDANT WAS NOT CALLED UPON TO DEFEND.

It clearly appears from the record that the case was tried in the Circuit Court upon the theory that the first count of the declaration was based upon the Safety Appliance Act and the second count upon the common law.

The first count after stating that defendant was an interstate carrier and engaged in commerce between the states, and that plaintiff was employed by it in such commerce, charges that plaintiff was in the exercise of due care and was injured by reason of a violation by defendant of the Safety Appliance Act. (Printed Trans., 4.)

The second count avers that plaintiff, while adjusting the couplers of certain cars, was injured by reason of the negligence of other servants of defendant

when those servants knew, or ought to have known that he was in a position of danger. (Printed Trans., 5.)

Although these counts are broad enough to admit proof of a case under the Employers' Liability Act, as held by the Court of Appeals (Printed Trans., 56), still the case was not tried nor the judgment obtained upon that theory. The court charged the jury that to sustain the contention of plaintiff it is necessary for him to show the car then in use was not equipped with automatic couplers as required by act of Congress (Printed Trans., 40); and that the second count of the declaration charges common law negligence. (Printed Trans., 43.)

In addition to this the court, upon plaintiff's request, submitted to the jury an express interrogatory as to plaintiff's due care at the time of the accident (Printed Trans., 42), and the court also instructed generally upon the question of contributory negligence and assumption of risk. (Printed Trans., 41.)

If the theory of the plaintiff's case below had been that plaintiff's right to recover was based upon the Employers' Liability Act, it is manifest that this interrogatory and these instructions would have been improper and had no place in the case, because that act in express terms excludes the defense of contributory negligence, and assumption of risk when a violation by the carrier of a statute enacted for the safety of its employes contributes to the injury.

Plaintiff and not defendant had the right to choose the statute or law upon which he would proceed in the trial court and defendant was called to defend upon that ground alone.

In *Hatcher* v. *Insurance Co.*, 184 Fed., 23 (C. C. A., Eighth Circuit), the court holds (p. 26):

> "And when a cause is tried upon an issue or theory presented by one of the parties in the trial court, that party will not be permitted in the Appellate Court to present a different issue or theory for its consideration. *Marine Bank* v. *Fulton*, 2 Wall., 252; *Lesser Cotton Co* v. *St. Louis I. M. & S. Ry Co.*, 114 Fed., 1133, 52 C. C. A., 95-102."

In *New York R. R. Co.* v. *Estill*, 147 U. S., 592, the head note reads:

> "that the case having been tried upon a certain theory in the court below, the position that another theory was proper cannot be taken for the first time in an Appellate Court."

In *San Juan Co.* v. *Requena*, 224 U. S., 97, held:

> "Effect must therefore be given to the well settled rule that where the parties with the assent of the court unite in trying a case upon the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an Appellate Court for review."

In *Yazoo, etc., Ry. Co.* v. *Greenwood, etc., Co.*, 227 U. S., 1, 3, held:

> "In saying this we do not give controlling effect to the observation contained in the opinion of the court below that no question was made as to the reasonableness of the regulation, since the opinion itself states that the ruling in the *Mayes* case was the main reliance of the railroad company, and in the argument at bar both sides have discussed the case on the theory that the substantial question to be decided was

> whether the rule of the Commission which the court below upheld was an unreasonable regulation in view of the decision in the *Mayes* case."

In *St. Louis, etc., Ry. Co.* v. *Hesterly*, 228 U. S., 702, suit was brought under a state statute. The defendant asked a ruling that the Employers' Liability Act controlled. This court held:

> "The Supreme Court treated the request as intended to raise the question whether the Employers' Liability Act of Congress of April 22, 1908, c. 149, 38 Stat. 65, displaced the state law as undoubtedly it was; stated that the suit was not based upon that act and held that the act of Congress was only supplementary and that the judgment could be upheld under the state law. 98 Arkansas, 240. Moreover, the plaintiff not defendant, had the election how the suit should be brought and as he relied upon the state law, the defendant had no choice if it was to defend upon the facts."

So here, the plaintiff's right to recover being founded upon the Safety Appliance Act, and the common law, defendant had no choice except to defend under the Safety Appliance Act and the common law. If the Employers' Liability Act had been relied upon, the line of defense would have been altered, a different charge to the jury would have been made by the trial court, and different requests for instructions would have been made by the defendant. The whole theory of defense would have been changed.

It seems clear from a reading of the opinion of the Court of Appeals upon rehearing that, if its conclusion had been based upon the theory upon

which the case was tried, the judgment would have been that of reversal instead of affirmance.

In *Chicago, etc., Ry. Co.* v. *Brown*, 229 U. S., 317, this court held:

> "The first count of the declaration is based upon a violation of the Safety Appliance Act, and it also contains allegations based upon the Employers' Liability Act. * * * The fourth count charges negligence in failing to fill up the space between a running rail and a guard rail, in which space Brown's foot caught, where it was run over and his leg cut off.
>
> "The case was tried to a jury, resulting in a verdict for $8,000 for Brown upon two counts, (a) for a violation of the Safety Appliance Law, (b) common law negligence in not blocking the switches."

Both the Court of Appeals and this court determined the *Brown* case without reference to the Employers' Liability Act upon the theory upon which it was tried below, to-wit, upon the Safety Appliance Act and the common law.

For these reasons we submit that plain error was committed by the Court of Appeals in determining the case at bar upon a theory different than that presented below.

It is unjust to sustain against defendant the view of the Court of Appeals because defendant's defense was adapted to the case made against it upon the trial, and this is strengthened by the fact that in the opinion of the Court of Appeals it is manifest that a determination of the case upon the theory of the trial would have resulted in a reversal instead of an affirmance of the judgment.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT COMMITTED NO ERROR IN REFUSING THE INSTRUCTION AS TO THE GIVING, BY PLAINTIFF, OF THE "COME-AHEAD" SIGNAL, BECAUSE,

1. UNDER THE THEORY UPON WHICH THE CASE WAS DETERMINED UPON THE ORIGINAL HEARING BY THE CIRCUIT COURT OF APPEALS, A REFUSAL OF THE INSTRUCTION WAS ERROR FOR WHICH THE JUDGMENT WOULD HAVE BEEN REVERSED.

2. UNDER THE CONCLUSION REACHED BY THE CIRCUIT COURT OF APPEALS UPON REHEARING, WHICH OPINION IS BASED UPON A CONSTRUCTION OF THE EMPLOYERS' LIABILITY ACT THE REFUSAL OF THE INSTRUCTION, WAS AN ERROR FOR WHICH THE JUDGMENT SHOULD BE REVERSED.

The instruction as to the giving of the "come-ahead" signal by plaintiff submitted the matter to the jury as one of law and not of fact. This was correct as held in *Beutler* v. *Railway Co.*, 224 U. S., 85-89:

> "But whether certain facts do or do not constitute a ground of liability is in its nature a question of law. To leave it uncertain is to leave the law uncertain."

So also, in *Mobile, etc., Ry. Co.* v. *Wilson*, 176 Fed., 127, Judge Woods, speaking for the Circuit Court of Appeals of said circuit, held:

> "It is the duty of the court, upon proper request, to give the jury a statement of any distinct doctrine or proposition which is fairly and justly applicable to the issues or to an important phase of the case."

UNDER THE FIRST PROPOSITION.

It seems clear that the Circuit Court of Appeals would have sustained defendant's contention that the refusal of this instruction was error and reversed the judgment if it had determined the case as one arising otherwise than under the Employer's Liability Act, because the court upon that theory justified the refusal of the trial court to give the instruction upon the ground that there was no evidence upon which to base it. It is clear, however, that in view of the opinion of the Circuit Court of Appeals when it was determined upon rehearing, that there was evidence upon which to base the refused instruction, that under the Safety Appliance Act the instruction should have been given. If it be considered as held by the Court of Appeals that plaintiff's act in giving the signal was contributory negligence alone, still contributory negligence is a complete defense to the action under the Safety Appliance Act as held by this court in *Delk* v. *Railway Co.*, 220 U. S., 580; *Schlemmer* v. *Railway Company*, 220 U. S., 590. There can be no room for any other contention in this respect. Congress did not intend by anything contained in the Safety Appliance Act to authorize or excuse a brakeman or switchman from needlessly going between cars. The very enactment of the law is a warning to employes to refrain from so doing.

UNDER THE SECOND PROPOSITION.

Upon rehearing the Court of Appeals held there was evidence upon which to base the instruction but justified its refusal as follows:

> "If, under the Employers' Liability Act, plaintiff's negligence, contributing with defend-

> ant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." (Printed Trans., 66.)

As we have shown under Point I of this brief, the trial did not proceed under the Employers' Liability Act, but under the Safety Appliance Act and the common law; but even under the Employers' Liability Act it was error to refuse the instruction.

It will be noted that Section 1 of the Liability Act renders the carrier liable to its servant for an injury or death resulting *in whole or in part* from the negligence of any of its officers, agents or employes, or *by reason* of any defect in its cars, engines, appliances, etc. (Appendix hereto.)

Plaintiff's right to a recovery was based upon a defective automatic coupler which he charges would not couple without the necessity of a man going between the ends of the cars.

The instruction states that if the jury believe from the evidence that the plaintiff gave the "come-ahead" signal and then went between the cars, and *in consequence thereof* was injured, the giving of the "come-ahead" signal was the proximate cause

of the injury, the defect in the coupler being the remote cause.

Signals were given by the plaintiff and obeyed by the engineer, and the cars were moved under plaintiff's orders. If the plaintiff gave the "come-ahead" signal and then went between the cars, whether for the purpose of adjusting the coupler or crossing to the other side of the track, or if he gave the "come-ahead" signal for any purpose and then went between the cars, his act was the sole and moving cause of his injury. Clearly the engineer was not guilty of any negligence in *obeying* plaintiff's signal. The moving and proximate cause was therefore plaintiff's own act.

In Thornton on the Federal Employers' Liability and Safety Appliance Acts, page 104, Sec. 72a, the author, after referring to the Federal act:

> "The proviso to section three provides that if the injury or death of the employe was occasioned by a violation by the common carrier of any statute enacted for the safety of employes, or, rather, if the violation contributed to it, the employe shall not be held to have been guilty of contributory negligence."

In such case, the author states the rule as follows:

> "And if the employe's act was the proximate cause of the injury, irrespective of the violation of the statute, then he cannot recover because the employer has been guilty of no actional negligence. So in instances of a violation of a (Federal) statute resulting in an injury to the employe, where section four provides it shall not be considered that the employe assumed the risk, the damages cannot be diminished by reason of his negligence contributing to the result.

But in all such instances the violation of the statute must have caused or produced the injury, must have been the proximate cause of it.''

The requested instruction was specific and directed the attention of the jury to the evidence, which the Court of Appeals found existed. (Printed Trans., 66.) If that evidence was admissible and there was no question raised as to its admissibility or objection made to its introduction, the instruction was applicable to that evidence and it was clearly error to refuse it.

It is not necessary that the proximate cause of an injury be necessarily a negligent act. Any act or omission which is the direct cause of an injury, or the *last conscious agent* in producing it, is the proximate cause thereof.

In *Atchison, etc., Ry. Co.* v. *Calhoun*, 213 U. S., 1, held:

> ''The law in its practical administration in cases of this kind regards only proximate or immediate and not remote causes, and in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. When in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Insurance Co.* v. *Tweed*, 7 Wall., 44-52.''

It seems clear that the giving of this ''come-ahead'' signal by plaintiff and not the alleged defective coupler under the theory of this instruction and evidence was the proximate cause of the injury.

In *Cincinnati, etc., Ry. Co.* v. *Mealer*, 50 Fed., 725 (Circuit Court of Appeals, Sixth Circuit), a switchman in uncoupling cars was walking or running with the train for the purpose of lifting the pin, when he stumbled over a piece of coke on the track and his arm was thrown between the deadwoods and injured. It was held that the *stumbling* was the proximate cause of the injury and evidence as to the defective condition of the coupler was immaterial.

From this it conclusively follows that plaintiff's "come-ahead" signal to the engineer set in motion the agency which resulted in his injury. If he had not given the signal he would not have been injured. The final cause was the cars coming together in obedience to the engineer's signal. The proximate cause was his giving the "come-ahead" signal which made the result possible.

In *Miner* v. *McNamara*, 72 Atl., 138, held:

> "Whether the defendant is liable for the plaintiff's injury depends upon whether its negligent or unlawful act was the proximate cause of that injury. 'That only is a proximate cause of an event, juridically considered, which in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred.' *Smith* v. *Connecticut Ry. & Ltg. Co.*, 80 Conn., 268, 270, 67 Atl., 888. The *last conscious agent* in producing the injury is the party liable for it. 1 Beven, Negligence in Law (3rd Ed.), 53. The law does not search for the more remote agencies by which the injury was brought about or made possible."

In *Schaffer* v. *Railroad Co.*, 105 U. S., 249, a passenger was injured in a railroad wreck and by reason

thereof became disordered in mind and body, and committed suicide. The court held:

> "The proximate cause of the death of Schaffer was his own act of self-destruction. It was with both of these cases a new cause and a sufficient cause of death."

In *Union Pacific Railway Co.* v. *Callaghan,* 56 Fed. (C. C. A., Eighth Circuit), 988, held:

> "But in every case the negligence of the master must be the proximate cause of the injury, and the burden is on the plaintiff to prove such acts of carelessness on his part as constitute the immediate cause of the accident. No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury—unless it is near to it in the order of causation."

Judge Cooley states the rule as follows:

> "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause from which last cause injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which was more remote." (Cooley on Torts, 3rd Ed., 99.)

The ruling of the Court of Appeals in the case at bar is not only erroneous, but inapplicable to the facts of the case. The ground of plaintiff's judgment was that he was injured in consequence of a defective automatic coupler. The Employers' Liability Act provides that the carrier shall be liable for injury or death of its employe

> "resulting in whole or in part from the negli-

gence of any of the officers, agents or employes of such carrier, or *by reason* of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats wharves, or other equipment."

36 Stat. at Large, 65, Chap. 149, U. S. Comp. Stat. Supp., 1909, page 1171.

See Appendix, *infra*.

It will be noted that the plaintiff was injured not by negligence in whole or in part of defendant's officers, agents or employes, but, as he contends, *by reason* of a defect in the automatic coupling apparatus of one of its cars.

This distinction was lost sight of by the Court of Appeals in its opinion in this case and we think in this respect error was committed by the Court of Appeals.

In *Chicago, etc., Ry. Co.* v. *McKean*, 40 Ill., 229, a statute which rendered the company liable to a fine of $50 for its violation and rendered it liable for all damages which shall be sustained by any person by reason of such neglect, held:

"An individual suing for damages must be able to show they were the legitimate and probable consequences of such neglect. * * * It is very evident the legislature did not intend to declare, nor have they declared that this omission of duty shall *per se* render them liable to damages for injuries. The injury must be shown by circumstances at least to have been the consequence of or caused by such neglect."

In *Indianapolis, etc., Ry. Co.* v. *Blackman*, 63 Ill., 121, held:

"It provides that the corporation shall be

> liable for any damages sustained *by reason* of the neglect to perform the duty imposed and not that it shall be liable for the mere non-performance. The injury must be the result of the omission."

In *Caswell* v. *Worth*, 5 Ellis & Blackburn's Rep., 848, Lord Coleridge said (p. 855):

> "The statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties. But there can be no doubt that a party receiving bodily injury through such omission has the right of suing at common law. The action, however, must be subject to the rules of common law; and one of those is, that a want of ordinary care, or wilful misconduct, on the part of the plaintiff, is in answer to the action."

Negligence in law means more than a violation of a duty owing the plaintiff from defendant, for it includes proximate cause as well. The Court of Appeals held that a liability existed to plaintiff under the act for defendant's negligence *in whole or in part*. The injury to plaintiff was caused *by reason*, as he alleges, of a defect in one of its cars.

We submit that the rule of law has not been correctly stated by the Court of Appeals in the case at bar, but if the technical rule is, as stated by the Court of Appeals, the circumstances are convincing that the real object which Congress had in mind would be better served by breach of the technical rule than by its strict observance, and that a carrier should not be held guilty of negligence in such a breach, and such negligence should not warrant a recovery of damages, for to justify a recovery such negligence must be the proximate and moving cause of the injury. Con-

gress itself has limited the operation of the statute. It was not intended by Congress that a carrier be rendered liable without actionable negligence. It would be contrary to any sense of justice to impose a liability upon one for injuries brought upon another by the affirmative act of the injured party. This is a defense which would need no legislative sanction.

In *American Railroad Co.* v. *Birch*, 224 U. S., 557, the Employers' Liability Act was involved. This Court held:

> "But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed."

The evidence produced by defendant as held by the Court of Appeals tended to show the injury to the plaintiff was naturally produced by his own original act. If the omission of defendant had no natural tendency to expose plaintiff to that injury, it was *a condition merely* and not a cause. The injury was not inflicted by reason or in consequence of defendant's omission, but in consequence of plaintiff's act.

It seems to us that legal language can have no meaning unless it is held that the words of the statute "*by reason* of any defect in its cars, machinery," etc., mean that the injury to the plaintiff here must result therefrom and not as held by the Court of Appeals "*in whole or in part* by defendant's negligence." The burden was upon plaintiff to prove that his injury resulted from a defect in the coupler and not from his own act, which act, if the jury should believe was the proximate cause of the acci-

dent, cannot be called contributory negligence, because that defense is eliminated in an action founded under the Employers' Liability Act. Contributory negligence is only a branch of the question as to whether plaintiff's negligence has been the proximate cause of the injury.

III.

THE COURT ERRED IN REFUSING THE FIFTH INSTRUCTION REQUESTED BY DEFENDANT.

The instruction is as follows (Printed Trans., 37):

> "The court instructs the jury that the testimony of defendant's car inspector, Hanses, that he did inspect the car in question and did not discover any defect in the couplers, that his testimony should be given the same consideration, other things being equal between the witnesses, as positive testimony."

Here plaintiff produced a witness, Miller, who testified that he could not close the knuckle with his heel and that if it had been in good condition he could have closed it with his heel as well as his hand.

Hanses, defendant's car inspector, testified that shortly before the accident he inspected the coupler and found it in good condition. (Printed Trans., 31.)

The burden of proof was upon the plaintiff to prove that the coupler was defective at the time of the injury. Plaintiff and Miller were the only witnesses testifying that the coupler was defective before the accident. The instruction was proper and it was error to refuse it.

In *Norfolk Ry. Co.* v. *United States*, 177 Fed., 630, held:

> "Positive testimony is to be preferred to negative testimony, other things being equal, but

> where it was the duty of an inspector on the part of the railroad company to inspect cars and he says that he did inspect the cars that came in and did not see the certain defective appliances that is not such negative testimony that it should not receive the same consideration, other things being equal between the witnesses, as positive testimony."

Plaintiff, Miller and Hanses were the only witnesses who testified as to the condition of the coupler before the accident, and we submit that the testimony of Hanses, the car inspector, was entitled to as much weight as plaintiff or Miller, the brakeman, whose only testimony was that he could not close the coupler by his foot. The other witnesses called by both plaintiff and defendant testified as to the condition of the coupler after the accident and this testimony was also conflicting, as founded by the Court of Appeals. (Printed Abst., p. 66.)

We regard *Louisville and Nashville Railway Co.* v. *Kelly*, 63 Fed., 407, as an answer to the conclusion of the Court of Appeals and as applicable here. Judge Woods, speaking for the Circuit Court of Appeals for the Seventh Circuit, held:

> "It may be that they are embraced by implication in some of the expressions of the general charge, but neither proposition is stated distinctly. Juries are not trained lawyers and notwithstanding a general charge covering the issues of a case, it is the duty of the court on proper request to give to the jury a statement of any distinct doctrine or proposition which is fairly and justly applicable to the issues or to an important phase of the case."

For the above reasons we submit that the judgments below should be reversed.

Respectfully submitted.

GEORGE W. KRETZINGER, JR.,
Attorney for Plaintiff in Error.

APPENDIX.

The Federal Employers' Liability Act.

An Act relating to the liability of common carriers by railroad to their employes in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states and territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to any per-

son suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; Provided, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such

employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 5 That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of

Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and Foreign Nations to their Employes," approved June eleventh, nineteen hundred and six. (34 Stat. at L. 232, Chap. 3073, U. S. Comp. Stat. Supp., 1909, p. 1148.) Approved April 22, 1908.

35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp., 1909, p. 1171.

An Act to amend an act entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases," approved April twenty-second, nineteen hundred and eight, be amended in Section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day of the cause of action accrued.

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of

competent jurisdiction shall be removed to any court of the United States."

SEC. 2. That said act be further amended by adding the following section as Section nine of said act:

"SEC. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe; but in such cases there shall be only one recovery for the same injury." Approved, April 5, 1910.

36 Stat. at L. 291, Chap. 143,

SAFETY APPLIANCE ACT.

An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel, brake, and appliances for operating the train-brake system, or to run any train in such traffic after said date that

has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act, the American Railway Association is

authorized hereby to designate to the Interstate Commerce Commission the standard height of draw-bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw-bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof, as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. (As amended April 1, 1896.) That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall

have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred, and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to it knowledge: Provided, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. That any employe of any such common carrier who may be injured by any locomotive, car or train, in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Public 113.

Approved March 2, 1893, amended April 1, 1896.

27 Statutes at Large, 531, Chap. 196, U. S. Comp. Stat. 1901, p. 3174.

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error, vs. GEORGE LINDSAY, Defendant in Error.	In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

For the facts repeated or emphasized in this reply brief, we refer this court respectfully to the statement of fact set forth in our original brief, pages 1 to 9 inclusive, particularly pages 4 to 7.

The contentions of counsel under each point of the brief for defendant in error will be answered *seriatim* under the same point number, following which we shall reply to the allegation that this writ of error, involving, among other things, an interpretation of the Employers' Liability Act not yet decided in this court, is sued out merely for delay.

I.

Counsel asserts that the first count "is clearly based upon both the Safety Appliance Act and the Employers' Liability Act." Neither of the two cases cited under this statement (*C. R. I. & P. Ry. Co.* v.

Brown, 107 C. C. A., 301; 229 U. S., 317; *Johnson* v. G. N. R. Co., 102 C. C. A., 89), supports the proposition. The attempted application of the Employers' Liability law was clearly excluded by the court below in the first named case (Trans. of Rec., Supreme Court of the United States, October Term, 1910, No. 925, *C. R. I. & P. Ry. Co.* v. *Brown*, pp. 46 to 49, 52); but there this theory was advanced in the course of the trial, while it was never so advanced in the trial court in the present case. This exclusion is further indicated by the statement of this court that (229 U. S., at p. 318), "the case was tried to a jury resulting in a verdict for $8,000 for Brown, upon two counts, (a) violation of Safety Appliance Act" (not of the Employers' Liability Act), "(b) common law negligence for not blocking the switches."

In the second named case there is nothing in the opinion to show the theory upon which the case was tried. Nor was this question of inconsistent theories raised in either of those two actions.

The question here is not whether the case *could* have been tried under the Employers' Liability Act, *but whether it was so tried*. That act is a new and individual statute, enacted for the benefit of the employes of a railroad company, when invoked in actions within the terms of that act at the proper time and place, by those who are bringing the action. It is also a defense to a defendant sued under a state statute, or the common law superseded by that act. This act, however, comes into play only at the choice of the plaintiff or on the demand of the defendant.

As the defendant cannot claim the benefit of this

act without raising the question at the proper time and in the proper manner, so the plaintiff cannot be heard to claim that he brought suit thereunder when the claim is first advanced in the Appellate Court and when the whole preceding conduct of the suit and frame of the pleadings is consistent only with another theory and form of remedy.

A claim under the common law and under the Employers' Liability Act cannot co-exist in the same count. The conditions precedent to a recovery and the two remedies are distinct and inconsistent. Among other things, contributory negligence, assumption of risk, and as a special form of the latter, the fellow-servant rule may be invoked as a complete defense to an action at common law. As bars to the remedy, all three of these are removed by the Employers' Liability Act.

Again, the defenses, as also the sources of remedy, under the Safety Appliance Act, considered alone, and under the Employers' Liability Act, are distinct. The two statutes are separate and individual, and neither one amends, succeeds to or repeals the other. While the ultimate purpose of each was the protection of the employe and more remotely that of the traveling public, the Safety Appliance Act primarily required the installation and maintenance of certain devices under a penalty independent of intention, and incidentally with this afforded a remedy to a servant injured by failure to obey this statute; while the Employers' Liability Act was designed, where invoked, to afford a general remedy to employes injured while employed in interstate commerce, by carriers engaged in such commerce.

As part of this latter new, distinct and separate statute, in all actions brought "*under or by virtue of any of the provisions of this act*" (Sec. 3; Original Brief, Appendix, page 29), any violation, not of the Safety Appliance Act as such, but of "any statute enacted for the safety of employes" contributing to the injury or death of an employe, takes away from the carrier all right to prove contributory negligence even in diminution of the damages. That these two acts exist independently, neither one repealed, affected or amended by the other, is evident not merely from a glance at their form, but in the distinctly separate object sought to be effected as the main purpose of each. Another indication of the distinction between these acts is that for the application of the Safety Appliance Act, neither the particular car nor even any car or engine in the particular train, need be in interstate commerce, as a condition precedent to the operation of the Act (*Southern Railway Co.* v. *United States*, 222 U. S., 20), and therefore it follows that the employe injured as a result merely of a violation of this Act need not be so engaged, while to come within the operation of the Employers' Liability Act, such an employe must be himself engaged in interstate commerce at the time. (Sec. 1, Original Brief; Appendix, p. 28.)

This case was originally brought in the Superior Court of Cook County, Illinois (Trans., p. 3), and afterwards removed to the Federal Court. Under the common law in this state, plaintiff in a suit for personal injuries was required to plead and prove due care and caution for his own safety at the time

of the injury complained of. So in the case of *Walters* v. *City of Ottawa,* 240 Ill., 259, at p. 266, it was held:

> "A declaration in an action to recover for injuries received through negligence which does not aver due care on the part of the plaintiff when he was injured, and does not contain any averment in regard to his conduct or the circumstances surrounding him from which due care on his part may be reasonably inferred, does not state a cause of action, and, after the period of limitation fixed by the statute has elapsed, cannot be amended to state a cause of action not subject to the bar of the statute. If a declaration omits to allege any substantial fact which is essential to a right of action and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. *Foster* v. *St. Luke's Hospital,* 191 Ill., 94; *Bowman* v. *People, supra.*"

In pursuance of this theory, relying on the Safety Appliance Act alone in one count and the common law in the other, the declaration of plaintiff, in both counts, alleged due care and caution for his own safety, submitted to the jury the express interrogatory as to contributory negligence (Printed Trans., 36-42), and the court, acting upon the plaintiff's theory, specifically instructed the jury as to whether or not plaintiff assumed the risk, or was guilty of contributory negligence. (Printed Abst., 41; Original Brief, Statement of Facts, p. 2.)

This, counsel for plaintiff now says, was only one of the two theories upon which each count was framed. On page 5 of his brief he admits that the allegations in these counts that plaintiff was in the

exercise of ordinary care **were inserted so as to make the counts good in the event that the Employers' Liability Act should be declared invalid,** but since the Act has been sustained these allegations may be treated as surplusage.

Passing for the moment the cases cited under this extraordinary admission, it is only necessary to point out that no authority has been cited by counsel, or, to the best of our knowledge, can be cited, permitting two distinct and inconsistent causes of action to be set forth and a remedy under the eventually proven and successful cause of action to be sought in the same count, so that in case one of these theories may fall, the same count may be sustained on the other. The Employers' Liability Act supersedes the common law. It cannot, therefore, co-exist with the common law. Where this statute is invoked, the common law cannot be relied upon. Where it is applicable and defended upon, an action under the common law fails. On the other hand, where the common law is the basis of the pleadings, the evidence, the instructions, the interrogatories submitted and the judgment, a different and inconsistent cause of action superseding the common law cannot be relied upon for the first time in this Court of Appeals. So, too, as shown above, the Safety Appliance Act is distinct from and allows other defenses than this Employers' Liability Act. Where it is relied upon, as such, the first-named statute has no place.

The allegations in these two counts do not stand alone as an objection to the application of the Employers' Liability Act, but are in corroboration of the

whole course of the trial. As noted from the statement of facts, that act was not merely never alluded to throughout the whole course of the proceeding, but the court instructed under the Safety Appliance Act and the common law (Printed Trans., 39, 43), and an interrogatory which the jury was required to answer under the common law was asked by counsel and given by the court.

We refer this court again to the cases cited on pages 13 and 14 of our original brief, and in particular to *St. Louis, Etc., Ry. Co.* v. *Hesterly,* 228 U. S., 702, 704, holding that "the plaintiff, not defendant, had the election how the suit should be brought, and as he relied upon the state law, the defendant had no choice if he was to defend upon the facts."

As to the cases cited by counsel at the foot of page 5: *Carlinville Coal Co.* v. *Abbott,* 181 Ill., 495, was a case expressly founded upon a statute, provided for by the Constitution of the State of Illinois, wherein the defense of contributory negligence was excluded. *Lucas* v. *P. & E. Ry. Co.,* 171 Ill. App., 1, showed nothing more than a mere allegation of due care and caution, no attempt to prove this allegation, no request for inconsistent instructions and interrogatories, no inconsistent theories and conduct by either court or counsel, beyond the preliminary averment; moreover this decision is from a court, not one of last resort, nor of authority in the district of the state in which this case was tried.

Counsel for plaintiff under Point I in the argument (pages 4 to 8) reiterates some three times the fact that each count was so drawn as to rely upon the common law in case the Employers' Liability Act

should not be sustained. Each count therefore must have been double, but this explanation is either an afterthought, or, since not made apparent for objection, until appeal, can afford no justification for an application of the Employers' Liability Act. Plaintiff could not meet this Act or change the course or method of defense, nor ask for appropriate instructions when the previous theory of the trial was not changed until judgment had been entered and the case closed. The whole course of the trial, as will be seen by reference to our statement of fact in our original brief, was consistent only with a proceeding at common law under the second count, and the Safety Appliance Act, taken alone, under the first; and both of these preserve contributory negligence as a bar to the whole action.

Schlemmer v. *Buffalo, Etc., Ry. Co.*, 220 U. S., 590, 596.

A fortiori they demand the submission to the jury of the instruction on proximate cause, by the conscious act of the appellee, resulting immediately in his injury.

II.

A.

That the Circuit Court of Appeals would have reversed the case for refusal to give the instruction in reference to the "come ahead" signal set out on page 7 of our original brief, is plain from its opinion, particularly that portion contained on page 67 of the printed transcript. It is on the theory

that the Employers' Liability Act instead of the Safety Appliance Act in the first count, and the common law in the second, governed and were invoked in both counts, that the Circuit Court of Appeals proceeded. That there was evidence to submit to the jury upon this very point is shown clearly in the statement of facts in our original brief, pages 4 to 7. Moreover, the Court of Appeals found that there was evidence to that effect. (Printed Trans., 66.)

Under the cases of *Mobile, Etc., Ry. Co.* v. *Wilson*, 176 Fed., 127, and *L. & N. Ry. Co.* v. *Kelly*, 63 Fed., 407, cited and quoted from at pages 16 and 27 of the original brief, this instruction should have been given. To refuse such an instruction was plain error upon the record, as it deprived defendant of the consideration by the jury of a clear defense and was based upon a palpable misconstruction of the Employers' Liability Act. The instruction as given in its modified form left it for the jury not only to determine whether the "come ahead" signal was given, but whether this signal was the proximate cause of the injury as distinguished from the condition of the coupler. (Trans., 41.)

If Lindsay went in between the cars after having given the signal to the engineer to shove the cars together, knowing they had already failed to couple four times (Original Brief, p. 4; Printed Trans., p. 16), it was his independent and conscious act that caused the injury and not a defective coupler. And whether or not a certain fact, if established by the evidence, constitutes the proximate cause of the injury complained of, and therefore constitutes a ground of liability, is a question of law and not of

fact, as held in *Beutler* v. *Railway Co.*, 224 U. S., 85-89. This is not a case of defeating plaintiff's recovery by calling assumption of risk or contributory negligence by some other name. If contributory negligence be a bar both at common law and under the Safety Appliance Act, much more so is the conscious intervention of the plaintiff, who creates for himself a place of danger by signalling with his lantern for cars to be shoved together, and after such signal deliberately steps into the peril so created for himself, knowing the coupler has not worked, and severe injury, if not death, must be the result. This is not evasion. It is common sense.

This argument and the statement of facts in our original brief cover also the third and fourth subdivisions of plaintiff's Point II (A). It is sufficient to say that it cannot be presumed that the jury would not have found as a fact that plaintiff gave the "come ahead" signal, where there is not only such evidence in the record, but where the Circuit Court of Appeals specifically declares that the evidence on this point was conflicting. (Printed Trans., 67.)

B.

Point III of our Original Brief, beginning at page 26, not only covers the questions involved under appellee's Point II (B), but contains a citation on the very question. The Circuit Court of Appeals for the Fourth Circuit in *Norfolk & W. Ry. Co.* v. *United States,* 177 Fed., 623, expressly held that the testimony of an inspector of the very kind in question was not negative but positive (page 629), and quoted (page 630) with approval from the case of

United States v. *B. & O. R. Co.*, 170 Fed., 456, the rule that this precise evidence should "receive the same consideration, other things being equal between the witnesses, as positive testimony".

Conclusion.

The plaintiff tried his case under the Safety Appliance Act alone in one count and the common law in the other. The Employers' Liability Act, therefore, was either an afterthought or, as admitted in counsel's brief, was relied on coincidently with the common law lest it might be considered unconstitutional. On the first named theory the case was proven up and the Employers' Liability Act was mentioned for the first time in the Circuit Court of Appeals. Upon this changed theory and under the misapprehension of the scope of the Employers' Liability Act, the Circuit Court of Appeals justified the refusal of the two instructions, which it would otherwise have held should have been given and which the defendant would have the right to have submitted to the jury in the form presented. Defendant was therefore denied its right of trial by jury on material and necessary elements of its defense, and plain error was committed against this right, upon this mistaken theory by the Circuit Court of Appeals.

The repeated contention of plaintiff, that a writ of error taken to correct these errors, determine the interrelation of the Employers' Liability Act, Safety Appliance Act, and common law, and the limits and

proper occasion of the application of each of them, should be met by a punishment of enhanced damages, requires no ~~repetition~~ refutation.

For these reasons we respectfully urge that the judgment be reversed and the case remanded.

Respectfully submitted.

GEORGE W. KRETZINGER, JR.,
Attorney for Plaintiff in Error.

10

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No. 425

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

GEORGE LINDSAY,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Brief of Argument.

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Geo. Hornstein Co., Printer, Chicago.

INDEX.

	PAGE.
Argument	4
Brief	4
Statement of facts	1

CASES CITED.

A. T. & S. F. Ry. Co. v. *Feehan*, 149 Ill., 212	19
Brunnworth v. *Kearnes Coal Co.*, 260 Ill., 215	11
Carlinville Coal Co. v. *Abbott*, 181 Ill., 495	5
Chicago City Ry. Co. v. *Hagenback*, 228 Ill., 294	14
Chicago G. W. Ry. Co. v. *Price*, 38 C. C. A., 243	15
Chicago J. Ry. Co. v. *King*, 94 C. C. A., 657	7, 11
Chicago R. I. & P. Ry. Co. v. *Brown*, 229 U. S., 317	5, 7
Freeman, Rec., v. *Swan*, 143 S. W., 724	11
I. C. R. Co. v. *Siler*, 229 Ill., 390	12
Johnson v. *G. N. Ry. Co.*, 102 C. C. A., 89	5
Lucas v. *P. & E. Ry. Co.*, 171 Ill. App., 1	5
M. & St. P. Ry. Co. v. *Kellogg*, 94 U. S., 469	9
Press Pub. Co. v. *Monteith*, 103 C. C. A., 508	17
Schlemer v. *Buffalo, etc., R. Co.*, 205 U. S., 14	5, 7, 11
So. Pac. R. Co. v. *Allen*, 106 S. W., 443	11
U. S. Smelting Co. v. *Parry*, 92 C. C. A., 165	17

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STATEMENT.

For convenience we shall herein refer to Lindsay as plaintiff and to the Railway Company as defendant. The reference pages, unless otherwise indicated, refer to the transcript of record.

It will be observed that defendant's counsel request a reversal of the judgment on account of the alleged error of the trial court in refusing two instructions. A brief review of the material facts of the case, if not indispensable, will at least be helpful to the court in considering the refused instructions.

The evidence shows that defendant's railroad was an interstate highway (13); that it was using the car and train in question in moving interstate commerce (14, 23); that plaintiff, a switchman, was injured while assisting in making up such train and hence he was injured while employed in interstate commerce. The cars in question stood upon a north and south track, the engine being coupled to the south end of the cars. It was necessary for plaintiff to couple the north end of the north car of the string of cars attached to the engine, to a car which stood north of said cars, on the same track. Three unsuccessful attempts were made, prior to the time of the injury, to couple these cars by shoving them together in the usual way, but they failed to couple (15). After the cars came to a standstill, after having failed to couple when they were last shoved together, the couplers stood about two feet apart (15), and thereupon plaintiff gave the engineer a "hard stop and stand signal" with his lantern, which, in railroad usage, meant "that I am going in to do some work between the cars" and "to stop and stand there until you get another signal" (15). After giving this signal, plaintiff went between the cars and was endeavoring to adjust the coupler by hand so that it would couple, when, without notice or warning to him, the engine shoved the cars together (15, 16), and plaintiff's right arm was thereby caught and so mangled between the couplers that it became necessary to amputate it within three inches of the shoulder (16). A number of witnesses, who examined the coupler both before and immediately after the accident, testified that it was in a de-

fective and inoperative condition (22, 25, 24, 23, 21, 22, 20, 21). The trouble was the "I" bolt of the coupler was bent (20).

There was evidence tending to show that *someone* upon the east side of the train, at or near the point of the accident, gave a signal for the train to move northward, immediately before the engine shoved the cars together, and that it was in response to this signal that the cars were shoved together. Plaintiff and a car oiler, who was working immediately east of the train near the point of the accident, testified that neither of them gave, nor saw any person give, such signal (16, 24). The conductor and engineer, who testified to the giving of such signal, were over 300 feet from the point of the accident (27), and as a come-ahead signal is given by raising and lowering a lantern (28), and as the oiler raised and lowered his lantern in doing his work (34, 35) the evidence indicates that it is probable the conductor and engineer misunderstood such movements of the oiler's lantern to be a come-ahead signal (27, 28).

In addition to the general verdict, the jury answered the following special interrogatories in the *affirmative* (42, 45):

"Do you find from the evidence that the defendant was guilty of a violation of the Safety Appliance Act, as charged in the first count of the declaration?

"If you find that defendant was guilty of a violation of the Safety Appliance Act, as charged, *do you find from the evidence that such violation was a proximate or concurrent cause of the plaintiff's injury?*

"Considering all the evidence, *including plaintiff's conduct in going between and while between the cars*, do you find that he was in the exercise of ordinary care for his own safety?"

It is apparent from the record that the writ of error has greatly delayed the proceedings on the judgment of the Court of Appeals, and that defendant in error has been put to a great deal of trouble and expense in getting this case placed upon the summary docket. We think it clear that the writ of error was sued out merely for delay, and if the court agrees with us in this regard we request the assessment of damages on that account, in pursuance to rule 23.

BRIEF OF ARGUMENT.

I.

THE CASE WAS NOT TRIED UPON A THEORY DIFFERENT FROM THAT UPON WHICH THE JUDGMENT WAS AFFIRMED BY THE COURT OF APPEALS.

The above proposition affects the question of the propriety of the trial court's action in refusing the instructions on the question of proximate cause, and hence we shall discuss it first.

In this connection counsel claim that the case was tried upon the theory that the first count was predicated *solely* upon a violation of the Safety Appliance Act, and that the second count was predicated *solely* upon the common law. There is no foundation for such claim, and it was so expressly held by the Court of Appeals. That court said in its *original* statement of the case:

"In the declaration are two counts, the first based upon *both* the Federal Safety Appliance and Employers' Liability statutes, and the second on the Liability Act *alone*." (Trans., p. 56.)

The first count is clearly based upon both the Safety Appliance Act and the Federal Employer's Liability Act. (*C. R. I. & P. R. Co.* v. *Brown*, 107 C. C. A., 301; 229 U. S., 317; *Johnson* v. *G. N. R. Co.*, 102 C. C. A., 89.) In fact counsel concedes that both counts are broad enough to permit recovery under the Employers' Liability Act. (Defts. Brief, p. 12.)

The Safety Appliance Act merely prescribes the carrier's duty, and it is settled that the breach of such duty is negligence *per se*. (*Schlemer* v. *Buffalo, etc., R. Co.*, 205 U. S., 14.)

The Employers' Liability Act, which probably supersedes the common law in that respect, gives the employe a right of action on account of the carrier's *negligence* in failing to comply with the Safety Appliance Act, as well as on account of its negligence in any other respect.

The second count contains the same allegations as the first, to the effect that both plaintiff and defendant were engaged in interstate commerce at the time of the accident, and it charges *negligence* upon the part of defendant's other servants in causing and permitting the cars to be shoved together. (5.)

The allegations in these counts, that plaintiff was in the exercise of ordinary care, were inserted so as to make the counts good in the event that the Employers' Liability Act should be declared invalid, but since the Act has been sustained these allegations may be treated as surplusage. (*Lucas* v. *P. & E. Ry.*, 171 Ill. App., 1; *Carlinville Coal Co.* v. *Abbott*, 181 Ill., 495.)

It is thus apparent, that so far as the pleadings are concerned, plaintiff was proceeding under the Safety

Appliance Act and Employers' Liability Act in the first count and under the Employers' Liability Act *only* in the second count. Counsel do not point out anything which occurred at the trial, which even tends to show that plaintiff did not try the case upon the theory that the first count was predicated upon both acts, and the only semblance of a ground for the claim that plaintiff did not try the case upon the ground that the second count was predicated solely upon the Employers' Liability Act, is the inadvertent reference by the court in its charge, to the second count as a common law count, to which contributory negligence would be a defense. The record shows, however, that plaintiff did not acquiesce in the court's statement in this regard, but, upon the contrary, he expressly excepted to the charge that contributory negligence was a defense (45), and which exception, of course, was taken upon the ground that the second count was based upon the Employers' Liability Act, to which contributory negligence was not a defense, but could be considered only in mitigation of damages.

There was certainly nothing in plaintiff's action, in requesting the submission of the special interrogatories, to sustain counsel's claim that the case was tried upon the theory that the Employer's Liability Act was inapplicable. The third interrogatory is the only one that even tends to lend color to the claim. As we have seen, that interrogatory was:

"Considering all the evidence, including plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care for his own safety?"

The constitutionality of the Employers' Liability Act had not been passed upon when this case was tried, and this finding was requested for two reasons, namely: There are cases holding that in actions under the Safety Appliance Act *alone*, the employe can not be charged with contributory negligence, *in going between the cars*, but can only be charged with such negligence by reason of what he did, or omitted to do, *while between the cars*. (*Schlemmer* v. *Ry. Co.*, 205 U. S., 1; *C. J. Ry.* v. *King*, 94 C. C. A., 658; *C. R. I. & P. Ry. Co.* v. *Brown*, 107 C. C. A., 301; s. c., 229 U. S., 317.)

The third interrogatory was requested, so far as the first count was concerned, so that in the event that it should subsequently be held that this distinction is unsound, the court's charge in this case, recognizing the distinction (41), would, in view of the finding, be held to be harmless error.

The interrogatory was further requested for the reason that plaintiff's conduct in all respects should be considered in determining whether he was guilty of contributory negligence under the second count. If the Employers' Liability Act should be sustained, then such negligence, if proven, should be considered in mitigation of damages, whereas, if the act was declared invalid, such negligence would defeat recovery. We see nothing in this finding, or in anything else that occurred at the trial, to warrant the claim that the case was tried upon the theory that the Employers' Liability Act was inapplicable. There was no warrant for the trial court's reference to the second count as a common law count, nor for instructing that contributory negligence was a de-

fense to that count, and as plaintiff did not acquiesce in the court's statement or instruction in this regard, but excepted to it, he should not be estopped from asserting that the second count was based upon the Employers' Liability Act and that contributory negligence was not a defense to it. The only effect of the trial court's action was to give defendant an advantage to which it was not entitled.

It is conceded that the Employers' Liability Act was applicable, and as it was counted upon in the pleadings, and nothing occurred at the trial to deprive plaintiff of the benefit of the Act, it should be considered in determining the propriety or impropriety of the court's action in refusing the instructions complained of.

II.

THE COURT DID NOT ERR IN REFUSING THE INSTRUCTIONS IN QUESTION.

A.

Complaint is first made of the refusal of the instruction upon the subject of proximate cause. The complaint is in reality of the *modification* of the instruction, for the court *did give it in a modified form*.

The refused instruction *as requested* was as follows:

"The court instructs the jury that if you believe from the evidence that plaintiff gave a 'come-ahead' signal to the switchman and engineer, and then went between the cars and in consequence thereof was injured, then the giving of the 'come-ahead' signal by plaintiff was the proximate cause of the injury, the

defect in the coupling being a remote cause, and plaintiff is not entitled to recover." (37.)

The instruction *as modified and given* was as follows:

"You are further instructed that if you believe from the preponderance of the evidence, that the plaintiff gave a 'come-ahead' signal to the switchman or engineer—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come-ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that under the circumstances the 'come-ahead' signal was the proximate cause of the injury, then your verdict must be for the defendant." (41.)

First. It will be seen that the only *difference* between the instruction as requested and as given is that the former declares, *as a matter of law,* that the giving of the "come-ahead" signal was the proximate cause of the injury, whereas the latter submits that question to the jury.

In *M. & St. P. Ry. Co.* v. *Kellogg,* 94 U. S., 469, the court said:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

We do not believe that even if plaintiff gave the "come-ahead" signal, etc., that the court would be warranted in instructing that it was *as a matter of law* the proximate cause of plaintiff's injury. But even if the court was warranted in so instructing, it was not guilty of reversible error in submitting the question to the jury, in the first instance. The differ-

ence between charging that plaintiff's alleged conduct was as a matter of law the proximate cause of his injury, and submitting that question to the jury, is not, in any event, *such plain error* as would require this court to reverse the judgment.

Second. We insist, however, that the modification was not improper *so far as defendant* is concerned. Section 1 of the Employers' Liability Act makes the carrier liable in cases like this, if the injury resulted "in whole *or in part* from its negligence," or, if the carrier's negligence "*contributed* to the injury." And Section 5 provides, in part:

"That no such employe, who may be injured or killed, *shall be held to have been guilty of contributory negligence, in any case, where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.*"

From these sections it follows that if defendant was guilty of a violation of the Safety Appliance Act in using the car in question, while the coupler was in such a defective and inoperative condition as to require plaintiff to go between the cars to couple them, then plaintiff's conduct in giving the "come-ahead," etc., or any other conduct upon his part, could not be charged against him as contributory negligence.

The question therefore is, can such alleged conduct defeat recovery on the ground that it and *not* defendant's negligence was the proximate cause of the injury? In other words, even if plaintiff did give the signal, etc., did defendant's negligence not also "contribute to the injury" or did the injury not result at least "*in part* from defendant's negligence"?

It is evident that as plaintiff's contributory negligence would not defeat recovery, defendant is seeking to defeat plaintiff's action merely by referring to his alleged conduct by another name. This it cannot do. (*Schlemmer* v. *Buffalo, etc., R. Co.*, 205 U. S., 1; *C. J. Ry. Co.* v. *King*, 94 C. C. A., 657; *So. Pac. R. Co.* v. *Allen*, 106 S. W., 443.)

In cases like this, where a statute relieves the injured servant from the charge of contributory negligence, *his conduct, so far as the question of proximate cause is concerned, is treated the same as the conduct of a stranger.* This distinction is pointed out and fully discussed in the case of *Brunnworth* v. *Kearnes Coal Co.*, 260 Ill., 210, 215. The court in that case practically held that the injured servant was guilty of contributory negligence, but as such negligence would not bar recovery, it said:

"There is no additional vitality imparted to such defense by viewing it from another angle and discussing it under the head of proximate cause." (See, also, to the same effect, *Freeman, Rec.*, v. *Swan*, 143 S. W. Rep., 724.)

As we have seen, the refused instruction provides that if plaintiff gave the "come-ahead" signal, and then went between the cars, and in consequence thereof was injured, he is not entitled to recover. This instruction could only be proper on the theory that the court was warranted in holding, *as a matter of law*, that the defective condition of the coupler, which *necessitated* plaintiff going between the cars, did not, in whole *or in part, contribute* to his injury. The court would certainly not be warranted in so holding as a matter of law, for it has been held,

either expressly or by necessary implication, in every case where the carrier was held liable for an injury sustained by an employe, thus required to go between the cars, that the defective and inoperative condition of the coupler, was a proximate, concurrent, or contributing cause of the injury. The intervening act of an employe, in thus going between the cars to operate defective couplers, is but a *result* or *consequence* of the defective condition of the couplers, and it is such a result, or consequence, as the carrier might reasonably *anticipate* would follow from the use of defective or inoperative couplers, and hence such conduct upon the part of the employe does not break the causal connection between the defective and inoperative condition of the coupler and his injury. (*I. C. R. Co.* v. *Siler,* 229 Ill., 390.)

The view of the case most unfavorable to the plaintiff is that his alleged conduct was a contributing or concurrent cause of the injury; but it is clear that the court would not have been authorized in holding, *as a matter of law,* that defendant's negligence, in using the car with a defective and inoperative coupler, was not *also* a contributing or concurrent cause of the injury, or, in other words, that defendant's negligence was not "in whole *or in part*" the cause of the injury, and unless it was warranted in holding, the instruction was properly refused.

It will be observed that the jury especially found that defendant was guilty of a violation of the Safety Appliance Act, and that such violation "*was a proximate or concurrent cause of the plaintiff's injury.*"

Third. The evidence was not of such a character as to make it the duty of the court to submit the question to the jury, as to whether plaintiff did, or did not, give a "come-ahead" signal. As we have seen, both plaintiff and the car inspector, who was close to the point of the accident, testified positively that plaintiff did not give such a signal. (16, 24.)

Upon the question as to whether the car inspector's movements of his lantern may not have been mistaken for a come-ahead signal, Daniels, the conductor, said:

"The come-ahead signal is to raise and lower the light, up and down." (28.)

Brick, the car inspector, said:

"In that work of packing the boxes, *I had my lantern and I was up and down* and my lantern would be all around there. (35.) * * * I was working down and held the lantern about a foot from the ground, and the switchmen held it about two feet from the ground. That is, just a little higher. * * * *I would straighten up after working with one box and come to the next one, and then I would raise my lantern and go to the other box,* and also take my lantern." (34, 35.)

It is true that at the time the alleged signal was given, Brick was about a car, or a car and a half, from plaintiff; in other words, between plaintiff and the engine.

Daniels, the conductor, said:

"Mr. Lindsay was about eight car lengths north, over 300 feet, or something of that kind. * * * At a distance of 300 feet, *I could just make out the lantern, but I could not make out the man. I cannot say whether it was the oiler or not,* but there was another lamp there, and possibly there may have

been more. *I could not tell, looking down that way, whether one lamp was a car length this side or the other side of the other light.*" (27, 28.)

It is evident from this testimony that the conductor's testimony that the signal came from where plaintiff was, meant only that it came from that *general locality,* and from his evidence above quoted it is clear that the signal might have as easily have come from the point where the car oiler was, as where plaintiff was.

The engine had hold of nine cars. Cars are between 38 and 40 feet long (27), and hence the engineer was about 360 feet from plaintiff. Assuming that the engineer would testify, as stated in the affidavit, that plaintiff gave the signal, it is clear that the statement was a mere *conclusion* which, under the circumstances, should not be treated as substantial evidence of the fact. In *C. C. Ry. Co.* v. *Hagenback,* 228 Ill., 294, the court said:

"It is true that a statement by a witness of a physical impossibility, or which *is in contradiction of matters of common knowledge* or laws of nature operating with uniformity, would be regarded as incredible and would not *tend* to produce in any rational mind a belief of the existence of the fact stated. As such testimony would not have any tendency to prove the fact averred it would not require the submission to a jury of the question whether the fact existed."

The testimony of the engineer and conductor, at most, raised a bare inference that plaintiff *may have* given the signal; but as plaintiff and the car inspector testified positively that he did not give the signal, and as no sane man would have thus given the signal and then go between the cars and put

his hand between the couplers, the inference that plaintiff gave the signal was sufficiently negatived. A trial court is not bound to submit any question to the jury, if, notwithstanding the verdict, it would be compelled to set aside the finding, as not being supported by substantial evidence. (*C. G. W. R.* v. *Price,* 38 C. C. A., 243.)

Fourth: It is clear defendant was not prejudiced by the modification of the instruction.

Some courts hold that in such cases the prejudice must affirmatively appear, while others hold it will be presumed; but the presumption is not, in any case, a conclusive presumption; and if, from an inspection of the entire record, it is apparent that the presumption of prejudice is overcome, there is no reversible error. If, in this case, the jury had found specially that plaintiff did not give a come-ahead signal, etc., it would perhaps be conceded that defendant would not be prejudiced by the refusal of the instruction, for it would be immaterial what the consequence of his giving the signal, etc., would be, if it was found that he did not give it. We claim that it is apparent, from the general verdict, and special findings, that the jury found that plaintiff did not give a come-ahead signal, etc. In construing the general verdict and special findings, it should be borne in mind that the court instructed that contributory negligence was a defense. The only evidence tending to show that plaintiff was guilty of contributory negligence was the evidence which it is claimed tended to show that he gave the signal and then went between the cars. If contributory negligence was a defense, all reasonable men would agree that if plain-

tiff gave the signal and then went between the cars, he would be guilty of contributory negligence and could not recover. The court, in giving the modified instruction, *assumed* that the giving of a come-ahead signal, etc., would amount to contributory negligence, and hence, when the jury found, as they did, by their general verdict, and special finding, that plaintiff was not guilty of contributory negligence, they necessarily found that did not give the signal, etc. As we have seen, the third special interrogatory, which the jury answered in the affirmative, was: "Considering all the evidence, including plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care?" While the court, in the part of its charge relating to the count based upon the Safety Appliance Act, held in effect that plaintiff could not be charged with contributory negligence, *in going between the cars,* but that the question of his negligence depended upon what he did *after he went between the cars,* yet the question of his care, *both in going between and while between the cars,* was, under the court's charge, involved under the second count. The statute requires that the jury should be composed of men of good judgment, etc., and it will be presumed that the jury that decided this case were men of that kind. It is inconceivable how such men, if they found that plaintiff gave the signal, and then went between the cars, could find that he was in the exercise of ordinary care, and consequently their finding was equivalent to a finding that he did not give the signal, etc.

Again, it must be conceded that there was, at most, but a bare inference that plaintiff gave the signal. His testimony and the testimony of the car inspector, that he did not give the signal, coupled with the fact that no sane man would thus give the signal and then go between the cars, clearly outweighed the bare inference which might possibly be drawn from the testimony of the conductor and engineer. It was, of course, the duty of the jury to find the fact in accordance with the preponderance of the evidence, and it should be presumed that they did so find. Error could in no event be predicated upon the refusal of this instruction, except upon the theory that the jury might possibly have found this fact contrary to the clear weight of the evidence.

The great preponderance, if not all, of the evidence showed that defendant was guilty of a violation of the Safety Appliance Act; and the clear preponderance, if not all, of the evidence showed that plaintiff did not give the come-ahead signal, which was the only conduct upon his part complained of, and in view of the evidence, and of the jury's general verdict and special findings, it is practically certain that the modification of the instruction in question did not affect the result; and that therefore the error, if any, was harmless. That judgments should not be reversed for alleged errors of this kind, see *U. S. Smelting Co.* v. *Parry*, 92 C. C. A., 165; *Press Pub. Co.* v. *Monteith*, 103 C. C. A., 508.

B.

Complaint is next made of the court's refusal to give the following instruction:

> "The court instructs the jury that the testimony of defendant's car inspector, Hanses, that he did inspect the car in question and did not discover any defect in the couplers, that his testimony should be given the same consideration, other things being equal between the witnesses, as positive testimony."

Hanses was defendant's car inspector at the stockyards, and he produced his book showing the cars inspected by him on the day of the accident, which book merely contains the initials and number of the car in question. The witness claimed that it was customary for him to note any defects that he found in the cars thus inspected, and that if he had found any defects in this car, his book would show it. He said, however, that he had inspected hundreds and thousands of cars, and that "I have no recollection of this car except as noted in my book." (31.)

This evidence falls far short of positive evidence that there was no defect in the coupler.

In view of this evidence it would have been improper for the court to construe Hanses' testimony as being "that he did inspect the car in question, *and did not discover any defect in the coupler*," whereas, all he said in effect was that his book showed that he had inspected the car, and that it was customary for him to note any defect he found in his book and that his book showed no defect. But aside from this, Miller testified that the coupler would not

work as the car was being hauled from the stockyards and several witnesses testified that it failed to work upon three separate occasions prior to the accident, and several witnesses testified that it was found in a defective and inoperative condition immediately after the accident. This was the positive testimony the jury would have understood the instruction to refer to and it would have been clearly improper to instruct that Hanses' testimony should be given the same consideration as this testimony.

It was a question for the jury to determine as to whether this evidence was entitled to the same consideration as positive testimony, and it was not the right or duty of the court to so declare as a matter of law. See *A. T. & S. R. Co.* v. *Feehan*, 149 Ill., 212.

As previously stated, we think it clear that the writ of error was sued out merely for delay, and we, therefore, respectfully request that the judgment be affirmed and damages assessed in pursuance of rule 23.

Respectfully submitted.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

GRAND TRUNK WESTERN RAILWAY COMPANY *v.* LINDSAY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 425. Argued February 27, 1914.—Decided April 6, 1914.

The operation and effect of the Employers' Liability Act upon the rights of the parties is involved in an action for negligence where the complaint alleges and the proof establishes that the employé was engaged in, and the injury occurred in the course of, interstate commerce even though the act was not referred to in the pleadings or pressed at the trial. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477.

Although § 3 of the Employers' Liability Act establishes a system of comparative negligence, and diminution of damages by reason of the employé's contributory negligence, the proviso to that section expressly provides that contributory negligence does not operate to diminish the recovery if the injury has been occasioned in part by the failure of the carrier to comply with Safety Appliance Acts.

It does not appear that any reversible error was committed by the court below concerning instructions asked and refused in regard to testimony of a car inspector and the weight attributable thereto. 201 Fed. Rep. 836, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and the validity of a judgment for personal injuries obtained thereunder, are stated in the opinion.

Mr. George W. Kretzinger, Jr., for plaintiff in error:

The Circuit Court of Appeals erred in affirming the judgment below upon a theory other and different from that upon which the case was tried. The Circuit Court of Appeals apparently conceded that upon the theory upon which the judgment was obtained it was erroneous and should be reversed.

Under either the theory adopted by the trial court or the Circuit Court of Appeals upon rehearing, the refusal to give the instruction requested by defendant in reference to the "come-ahead" signal by plaintiff was erroneous.

The Circuit Court of Appeals erred in sustaining the trial court in refusing the fifth instruction requested by plaintiff. It also erred in refusing to sustain each and every error assigned upon the record and urged by defendant in court.

In support of these contentions, see *American R. R. Co.* v. *Birch*, 224 U. S. 557; *Atchison &c. Ry. Co.* v. *Calhoun*, 213 U. S. 1; *Beutler* v. *Railway Co.*, 224 U. S. 85; *Caswell* v. *Worth*, 5 Ellis & Bl. 848; *Chicago &c. Ry. Co.* v. *McKean*, 40 Illinois, 229; *Chicago &c. Ry. Co.* v. *Brown*, 229 U. S. 317; *Chicago &c. Ry. Co.* v. *King*, 222 U. S. 222; *Cincinnati &c. Ry. Co.* v. *Mealer*, 50 Fed. Rep. 725; Cooley on Torts, 99; *Delk* v. *Railway Co.*, 220 U. S. 580; *Hatcher* v. *Insurance Co.*, 184 Fed. Rep. 23; *Indianapolis &c. Ry. Co.* v. *Blackman*, 63 Illinois, 121; *Louis. & Nash.*

Ry. Co. v. *Kelly*, 63 Fed. Rep. 407; *Mobile &c. Ry. Co.* v. *Wilson*, 176 Fed. Rep. 127; *New York R. R. Co.* v. *Estill*, 147 U. S. 592; *Miner* v. *McNamara*, 72 Atl. Rep. 138; *Norfolk Ry. Co.* v. *United States*, 177 Fed. Rep. 630; *Schafer* v. *Railroad Co.*, 105 U. S. 249; *St. Louis &c. Ry. Co.* v. *Hesterly*, 228 U. S. 702; *San Juan Co.* v. *Requena*, 224 U. S. 97; *Schlemmer* v. *Railway Co.*, 220 U. S. 590; Thornton on Fed. Emp. Liability Act, 104; *Union Pacific Ry. Co.* v. *Callaghan*, 56 Fed. Rep. 988; *Yazoo &c. Ry.* v. *Greenwood Co.*, 227 U. S. 1.

Mr. James C. McShane for defendant in error, submitted.

Mr. Chief Justice White delivered the opinion of the court.

The right of the plaintiff who is defendant in error here to recover for an alleged personal injury, was stated in two counts. In both, the wrong was alleged to have been occasioned by the negligence of the railway company, while it was engaged in carrying on interstate commerce and while the plaintiff was employed by it in such commerce. In the first count, however, the act of Congress known as the Safety Appliance Act was expressly declared on. For the purposes of the writ of error which was prosecuted by the railroad company from the Circuit Court of Appeals, numerous assignments of error were made and were all disposed of by the court in a full opinion. (201 Fed. Rep. 836.) In view of the complexion of the case as here presented we need address ourselves to only one of such assignments and to state the facts only so far as essential to its consideration.

The proof showed that the plaintiff was one of a crew working a switch engine, and that in a yard near Chicago such engine coupled with four loaded freight cars moving

in interstate commerce were held in order to make a coupling with a number of other loaded freight cars moving in interstate commerce to the end that an interstate train bound eastward might be made up and depart. When by impact it was attempted to make the coupling, the cars failed to couple automatically and after several efforts to cause them to do so, the plaintiff as switchman walked along beside the end of the car as it approached again the point of coupling, signaled to the engineer to stand fast and entered between the cars for the purpose of ascertaining and remedying if possible the cause of the trouble. While between the cars and engaged in handling the coupler, the cars were pushed up and he was caught and his arm crushed. There was some proof tending to show that the switchman stepped in before the moving cars had entirely stopped and some that he gave a signal to come-ahead as he stepped in; but there was evidence tending to show to the contrary and to support the inference that the act of the engineer in moving up, was the result of a signal with a lantern, for it was dark, mistakenly given by some other employé in the vicinity, or a mistake of the engineer in misconceiving the movement of a lantern in the hands of some of those who were standing around. There was evidence tending to show that the coupler had been inspected shortly before the accident and no defect was observed by the inspector, but it was shown without dispute, that it was defective at the time of the accident, and would not couple automatically because of a bent pin.

Among the errors assigned in the court below was the refusal of the trial court to give an instruction relating to the action of the switchman in entering between the cars and his supposed giving of the come-ahead signal. This instruction, while leaving to the jury the determination of whether the switchman in going between the cars to examine the coupling mechanism gave a come-ahead signal,

nevertheless asked the court to instruct as a matter of law that if he had done so, his act was the proximate cause of his injury, and therefore he could not recover. Instead of giving this instruction the court modified it by leaving it to the jury to determine whether under all the circumstances the action of the switchman had been reasonably careful. The court in its general charge on this subject said:

"If after he started to go between the cars he has done something which was carelessly done or which you can say from a preponderance of the evidence contributed approximately to the accident, then he cannot recover. . . . If there be contributory negligence at all, it depends not upon his assuming the risk under the circumstances in evidence in this case but upon the care with which he acted while in the performance of the work which he assumed.

"You are further instructed that if you believe from the preponderance of the evidence, that the plaintiff gave a 'come-ahead' signal to the switchman or engineer,—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come-ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that under the circumstances the 'come-ahead' signal was the proximate cause of the injury, then your verdict must be for the defendant.

"You are also instructed that where there is a safe and a dangerous way of doing an act, and the servant uses a dangerous way and is injured thereby, he is charged with negligence on his part and may not recover."

The court below disposed of the refusal of the trial court to charge as a matter of law that there was no right to recover if the proof showed that the switchman had given the 'come-ahead' signal, upon the ground that there

was no foundation for giving it as there was no evidence whatever tending to show that such signal was given by the switchman. A petition for rehearing was however granted and after a reargument, the particular objection concerning the charge referred to, as well as other matters, were disposed of in an additional opinion. As to the charge referred to, the court held that a mistake had been committed in the first opinion in saying that there was not any evidence tending to show that the switchman had given the 'come-ahead' signal as he entered, and therefore the ground upon which the previous ruling had been based was inadequate. It was nevertheless held that the ruling as previously made was right because the request to charge as a matter of law that the plaintiff was not entitled to recover if it was found that he had given the 'come-ahead' signal as he entered to examine the mechanism was incompatible with the rule of comparative negligence established by the Employers' Liability Act. On this subject the court said, 201 Fed. Rep. p. 844:

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

As in the argument at bar reliance is solely placed except in one particular, upon error which is assumed to have arisen from the refusal of the trial court to give the charge previously referred to and the judgment of the court

below in approving this action of the trial court upon the theory that it was right in view of the provisions of the Employers' Liability Act, we come to consider this subject.

(a) In the trial court it is insisted the operation and effect of the Employers' Liability Act upon the rights of the parties was not involved because that act was not in express terms referred to in the pleadings or pressed at the trial and was hence not considered by the court in acting upon the requested charge and therefore it is urged it was error in the reviewing court to test the correctness of the ruling of the trial court by the provisions of the Employers' Liability Act instead of confining the subject exclusively to the Safety Appliance Law and the rules of the common law governing negligence. But the want of foundation for this contention becomes apparent when it is considered that in the complaint it was expressly alleged and in the proof it was clearly established that the injury complained of was suffered in the course of the operation of interstate commerce, thus bringing the case within the Employers' Liability Act. It is true that to avoid the irresistible consequences arising from this situation it is insisted in argument that as no express claim was made under the Employers' Liability Act, therefore there was no right in the plaintiff to avail of the benefits of its provisions or in the court to apply them to the case before it. But this simply amounts to saying that the Employers' Liability Act may not be applied to a situation which is within its provisions unless in express terms the provisions of the act be formally invoked. Aside from its manifest unsoundness considered as an original proposition the contention is not open as it was expressly foreclosed in *Seaboard Air Line Ry. Co.* v. *Duvall*, 225 U. S. 477, 482.

(b) Coming to consider the proposition that although the case be governed by the Employers' Liability Act error

was nevertheless committed in sustaining the action of the trial court in refusing to give the requested instruction, we think that even if for the sake of the argument it be assumed that the proof brought the case within the principle of comparative negligence established by the Employers' Liability Act, the correctness of the ruling of the court below is clearly made manifest by the reasoning given by the court for its conclusion. But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence, that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the Safety Appliance Act and by the contributing negligence of the switchman in going between the cars. Under this condition of things it is manifest that the charge of the court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the third section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence since the statute substitutes for it a system of comparative negligence whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier, in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employé (*Norfolk & Western Railway Co.* v. *Earnest*, 229 U. S. 114, 122), nevertheless under the terms of a proviso to the section contributory negligence on the part of the employé does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress

enacted to promote the safety of employés. In that contingency the statute abolishes the defense of contributory negligence not only as a bar to recovery but for all purposes. The proviso reads, act of April 22, 1908, c. 149, § 3, 35 Stat. 65, 66:

"Provided, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

The only other objection pressed in the argument at bar concerns an instruction asked and refused by the trial court with reference to the weight to be attributed to the testimony of a car inspector who inspected the coupler in question before the accident. The subject of this asserted error was evidently carefully considered by the trial court and was adversely disposed of by the court below, both in its original and in the opinion on the rehearing. Under these circumstances without going into detail in view of the doctrine to be applied to cases of this character as announced in *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Chicago, R. I. & P. Ry. Co.* v. *Brown*, 229 U. S. 317, we are of the opinion that we need do no more than say that after a careful examination of the subject we are of the opinion that no reversible error was committed by the court below, and its judgment is therefore affirmed.

Affirmed.